Affirmed 20-264
Thos. Davis
Thos Swayne Decide

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 301.

N. A. McPHAUL, SARAH McPHAUL, ISHAM TIPTON, ANN E. TIPTON, R. W. GOODE, MARGARET PARSONS, M. W. LUCKEY, NATHANIEL WHITE, AND EDWARD SMITH, PLAINTIFFS IN ERROR,

vs.

JOHN W. LAPSLEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED NOVEMBER 30, 1872.

Oct. 2, 1873

SUPREME COURT OF THE UNITED STATES.

No. 301.

N. A. McPHAUL, SARAH McPHAUL, ISHAM TIPTON, ANN E. TIPTON, R. W. GOODE, MARGARET PARSONS, M. W. LUCKEY, NATHANIEL WHITE, AND EDWARD SMITH, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA,
Western District of Texas:

Circuit court of the U. States, 5th circuit, sitting at Austin, Texas.

Be it remembered that, at a term of the circuit court of the United States, 5th circuit, begun and held at Austin for the western district of Texas, January term, A. D. 1872, among other were the following proceedings, (Hon. W. B. Woods presiding:)

Came the plaintiff in the following-recited cause, and filed in the clerk's office of said court a transcript of the record from the district court of McLennan County, of the proceedings therein in the following cause, removed by order of said district court for trial in this court, to wit:

Transcript of the record from the district court of McLennan County.

Filed Oct. 10, 1871.

M. HOPKINS, *Clerk.*

JOHN W. LAPSLEY, PL'FF,
vs.
N. A. MCPHAUL, SARAH MCPHAUL, ISHAM TIPTON, Ann E. Tipton, R. W. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathaniel White, & Edward Smith, defendants. } No. 1093. No. 1184. L.

Which is in words, to wit:

2 THE STATE OF TEXAS,
County of McLennan:

District court of McLennan County, Texas, at Waco, Texas.

At a term of the district court of McLennan County, State of Texas, begun and held at the city of Waco on the eighth Monday after the second Monday in June, in the year of our Lord one thousand eight hundred and seventy-one, said day being the 7th day of August, A. D. 1871, before the hon. J. W. Oliver, judge of said court, presiding, among other were the following proceedings, to wit:

Pl'ff's petition.—Filed 31st March, 1863.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

THE STATE OF TEXAS,
County of McLennan:

To the judge of the district court in and for the county of McLennan:

The petition of John W. Lapsley, a citizen of the State of Alabama, residing in Dallas County therein, complaining of N. A. McPhaul,
3 Isham Tipton, Ann E. Tipton, R. N. Goode, Margaret Parsons, S. H. Johnson, Mark Byrd, M. W. Lucky, Nathaniel White, and

Edward Smith, who are citizens of the State of Texas, residing in the said county of McLennan, respectfully represent':

That on the 1st day of January, 1861, the said John W. Lapsley was the lawful owner and in possession of a certain tract or parcel of land, with the appurtenances thereunto belonging, lying and situate in the county of McLennan, being the same granted by the proper authorities of Coahuila and Texas to Tomas de la Vega on the day of , 18 , and containing eleven square leagues of land, and bounded and described as follows, to wit: Beginning at Rob't Barris' N. W. corner of three leagues survey on Brazos, a stake bearing N. 75° W. $12\frac{1}{10}$ varas from a box-elder 6 inches in diameter; thence up the Brazos River, with its meanders, 14,080 varas, in a right line with general course of said river to a stake, bearing S. 9° E. $2\frac{2}{10}$ varas from a cottonwood 18 in. in diameter; thence N. 62° E. 22,953 varas to a stake in pra'rie; thence S. 28° E. 14,180 varas to stake on Rob't Barr's north boundary of 3 leagues; thence S. 62° W. 17,093 varas to place of beginning;
4 crosses near Tehuacana Bayou, 16,733 varas, or at 360 varas from main river; and that on the date first aforesaid, namely, on 1st day of January, 1861, within the said county of McLennan, the said defendants hereinbefore named, to wit: N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Lucky, Nathaniel White, and Edward Smith, wrongfully and with force and arms entered upon the said premises and tract of land hereinbefore described, and so belonging to and in possession of your petitioner, and then and there wrongfully and with force and arms the said defendants, and every of them, put out and ejected your petitioner from and out of his said premises and tract of land, and took and have ever since kept and held violent and wrongful possession thereof, and have kept out your petitioner from his said premises to the present time; and during all that time the said defendants and every of them have been in possession and receipt of the rents and profits of and from the said premises, of the value of twenty thousand dollars, and have cut down, destroyed, and taken away the
5 timber and *and* wood on said land, of the further value of ten thousand dollars, and other wrongs and injuries to said premises and against your petitioner, the said defendants and every of them have committed: all of which is to his damage one thousand dollars.

Wherefore he brings suit and prays citation to said defendants and every of them, and judgment, on the hearing of this cause, for the recovery of the said *damages* and of possession therefor, and for all other and further relief to which he is entitled in law.

JOHN W. LAPSLEY,
Petitioner.

HALE, COKE & GURLEY,
Attorneys.

MEM.—And upon the foregoing petition is endorsed words following, to wit:

"This action is brought as well to try title as for damages.
"JOHN W. LAPSLEY, *Petitioner.*"

File-mark.

Filed March 31st, 1863.

T. SPARKS, *Clerk*,
By C. B. MAY, *Deputy.*

Answer of def't R. N. Goode.—Filed May 24th, 1864.

In district court of McLennan County, spring term, 1864.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } No. 1093.

6 And now comes one of the defendants, R. N. Goode, in his own proper person, in the above-entitled suit, and demurs to the pet. of plaintiff herein, and says that the said petition is wholly insufficient in law for the plaintiff to have or maintain his aforesaid action against the defendant R. N. Goode.

R. N. GOODE.

And defendant says, for further answer in this behalf, that he denies all and singular the allegations in plaintiff's petition, &c.

R. N. GOODE.

And, for further answer, defandant denies that he has committed any trespasses or wrongs in the manner and form as alleged in plaintiff's petition, and says he is not guilty.

R. N. GOODE.

And, for further answer, defendant says that he is the owner in fee-simple of nine hundred and sixty-three acres of land, on which he had a farm, and that he has been the owner of all said tract of land; was seized & possessed thereof, and every part thereof, for more than three years before the commencement of this suit, and has possessed, held, owned, and enjoyed the same in his own right & those whom he purchased from and holds under, against the claim & claims of any and all persons whatsoever for more than three years next before
7 the commencement of this suit, with quiet & peaceable possession, use, and occupation of the same, with title or color of title. Wherefore he pleads the statute of limitation thereon & thereto of three years.

R. N. GOODE.

And, for further answer in this behalf, the defendants says that he is still the owner in fee-simple of nine hundred and sixty-two acres of land, a part of the William Dillard league of land, which this suit is brought for, on which he now has a farm, cultivating, using, and enjoying said tract of land, in quiet and peaceable possession, for more than five years next before the filing of the above-styled suit, with a deed or deeds on record, paying taxes thereon said land, as aforesaid, and those under whom he claims to have purchased from. Wherefore he pleads the stat ute of five years' limitation thereon in all such cases made and provided for.

And, for further answer in this behalf, defendants say' that he is the lawful owner and in fee-simple of nine hundred and sixty-two acres of land, a part of the William Dillard league of land, for which this suit is brought, and that he has been seized and possessed of said land, owning, cultivating a part thereof, and injoying the same
8 in the quiet and peaceable possession & claiming the same as aforesaid, under deed or deeds, paying taxes thereupon for more than ten years next preceeding or before this suit was filed or commenced, under deeds aforesaid, and those whom he purchased from. Wherefore

he pleads the statute of ten years' limitation made and provided for in such cases.

R. N. GOODE.

And, for further answer, defendant says that he has made large and valu'ble improvements on said tract of land, as aforesaid in former plea, on which he now resides with his negroes and stock of cattle and horses; that he purchased said land in good faith for a valu'ble consideration and has made his settlement thereon. He made large, extensive, and very valu'ble improvements on said land, by building negro-cabins, stables, out-houses, clearing & inclosing said land, or a part thereof, and cultivating the same, making a good fence and substantial houses. Wherefore he prays judgment for said land and for the value of said improvements, which defendant alleges to be of the value of five thousand dollars.

R. N. GOODE.

And, for further answer, defendant says that the pretended claim set up by plaintiff is null and void, and that the pretended claim in
9 which plaintiff pretends to hold under as a title, was derived from under a pretended power of attorney to sell a certain tract of eleven leagues of land, granted to Thomas de la Vega, which was a forgery & fraudulent; that Thomas de la Vega did not make or cause to be made to the party aforesaid any such power of attorney, or authorize the party aforesaid to sell, in any way whatever, the said lands or any part thereof; and of this defendant is ready to verify.

R. N. GOODE.

And endorsed upon the foregoing answer was the following, to wit:

"Filed May 24, A. D. 1864. J. W. Downs, clerk, by J. Mullens, deputy."

Pl'ff's motion for sev'rance.—Filed 24 May, 1864.

In the district court of McLennan County, spring term, A. D. 1864.

JOHN W. LAPSLEY
N. A. McPHAUL ET AL. } No. 1083.

Now, on this day, the said complainant, by attorney, comes into open court and shows to the court that there is no identity of interest in this case so far as the interest of R. N. Goode is concerned, connected with the other defendants herein, and that if the case was severed so far as to permit this case to be prosecuted against Goode alone, the interest of the other parties to said suit would not be effected thereby.
10 The complainants therefore move the court to sever said case, so that the suit may be maintained against said Goode without prejudice to the rights of the other parties; of this he prays, &c.

E. J. GURLEY,
For Lapsley.

Upon the foregoing motion was endorsements as follows, to wit:

"Filed May 24th, 1864.

"J. W. DOWNS, *Clerk*,
"By J. H. MULLENS, *Deputy*."

Judgment of court.

In the district of McLennan County, spring term, A. D. 1864.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL & WIFE, ISHAM TIPTON & WIFE, R. W. Goode, et als.

No. 1093. Suit to settle title to lands.

MAY 27TH, 1864.

Be it remembered that on this day came the plaintiff, John W. Lapsley, by his attorney, James Yell, and R. N. Goode, in his own proper person, and moves the court for a severance from the other defendants in the trial of this case.

It appearing to the satisfaction of the court that the suit against R. N. Goode is seperate and distinct in interest from the interest or claim of the other parties defendant to this suit, and that they are no
11 wise interested or prejudiced by said severance, it is therefore ordered accordingly.

And it appearing to the court that said Goode had fully answered said complainant's petition herein, on this day this cause came on to be heard, upon the confession and statements of the parties made in presence of the court, and the introduction of an agreement made and executed on the part of the said Lapsley, by his attorney, E. J. Gurley, and by said defendant Goode, acting for himself, bearing date the 30th of March, one thousand eight hundred and sixty-four, duly signed by the parties, and acknowledged as their action in open court.

Wherein the said agreement, bearing date as aforesaid, it is stipulated that R. N. Goode is to have of the Thomas de la Vega eleven-league grant the number and quantity of seven hundred and sixty-three acres of land out of Dillard league, to be surveyed adjoining the land belonging to said Goode; and that said Lapsley was to have, free from the claim or right of said Goode, all the ballance of the said Dillard league.

In said agreement it was also stated that the above stipulation was not not mentioned in the judgment of vs. , of Falls County, because R. N. Goode was not a party thereto; but is stipulated
12 in said agreement that the above-mentioned land should be adjudged to said Goode in this suit in court in this county; said land is to be marked & surveyed according to the wishes of said Goode, he take the upper line of the eleven-league grant for a basis, and connect with the Kellum lands. It also appearing to the court here that there was an additional agreement in writing signed by the said Goode and the said Gurley, as attorney for Lapsley, making the same stipulation the said parties as the agreement, & in addition to what was in the other agreement, that this was also a settlement with Thomas de la Vega as to his claim to said lands, and stating that said seven hundred and sixty-three acres of land was not confined to said Goode, because he was to the said suit in Falls County that the decree made herein is part of said agreement as to the judgment of Falls County, and that this was part of the consideration of the aforesaid agreement. The parties aforesaid, in consideration of saving much expense and delay and annoyance in litigation, & for the purpose of quieting the
13 title to said lands and making peace, have consented in said agreement, and do now, in open court, consent that the court may render a decree herein, forever quieting the titles between the par-

ties to the lands aforesaid; and it further appears to the satisfaction of the court that the said Goode had made the survey mentioned aforesaid and had selected the said amount of seven hundred and sixty-three acres of land, which was herein in open court received and acknowledged as the true land mentioned in said several agreements, commencing & running, according to said agreement, situated in the county of McLennan, on the east side of the Brazos, and known and described as follows, to wit: Beginning at a stake, the point "A," on the Eldy line of W. R. Kellum survey, where the upper line of La Vega 11-league grant crosses the same, being the N. W. corner of 202 acres, survey made for Mrs. E. V. Goode, from which a do. 17 inches dia. bears N. 27° E. 1 varas; do. 10 inches dia. b'rs S. 27° W. 1 varar; thence S. 30 E., 791 varas, to W. R. Kellum, S. E. corner, from which a P. O. "W.," b'rs E. dist. 3½ varas; thence N. 60° E. 95 varas, the N. cor. of Edward Kellum's survey; thence S. 30° E. 570 varas, to a stake for S. W. corner of E.
14 V. Goode's survey, from which a mesquite 14 inches dia. b'rs N. 70° E. 9 varas; thence N. 60° E. 853 varas, to a stake set for E. V. Goode's S. E. corner, from which a mesquite 10 in. dia. N. 30 W. 3 varas; thence no. 30° W., 920 v'r's, to a stake for R. N. Goode's S. W. corner, 128 acres, part of the Morgan 256-acre survey; thence N. 62° E., 1,818 varas, a stake set for S. E. corner of said 128-acre survey, a post-oak 6 in. in diameter bears north 68° E., 3 varas; do. 10 in. dia., marked X, b'rs S. 10 E., 8½ v'r's; thence south 30° E., 400 varas, to S. E. corner of Morgan survey, from which a P. O. X. 12 in dia., b'rs N. 67° W., 8 in.; do., 14 inches dia., b'rs N. 34 E., 13 v'r's; thence S. 60 W., 502 v'r's, to a stake set in said Morgan's S. line for N. W. corner of R. N. Goode 435-acres survey, from which a black-jack 8 in. in dia. b'rs N. 37½ E. 4 varas, and P. O. 20 in. dia. b'rs S. 41¼ W. 19 varas; thence S. 30° E. (v'r's 10½ E.) 1,174 varas, across Corsicana road, 1,274 v'r's; set a stake in the S. boundary-line of Diller league for S. E. corner of this survey, from which a post-oak 14 in. dia., marked X, b'r's N. 9½ W. 17½ varas; thence with Diller's line north 58¾ E. "Vernier," 10½ E. 1,435, to the S. W. corner of a survey made for H. Peters, for S. E. cor. of this; from which
15 a post-oak 6 in. dia. bears S. 48½ W. 6 in., & black-jack 5 in. dia. b'r's N. 59 E. 1½ varas; thence N. 30° W. Vernier 10½ E. 246 varas, Corsicana road, 1,977 varas, the S. W. corner of a survey made for Mark Byrd, in the N. E. line of la Vega, for N. E. corner of this survey, from which a P. O. 12 in. in dia. b'r's N. 78½ W. 1¼ varas, do. 15 in. dia., bears S. 76 E. 5 varas; thence S. 62 W. (V., 10¼,) with said upper line of Le Vega, at 933 varas from the N. E. cor. of Morgan survey, 2,751 varas, the N. E. corner of E. V. Goode's survey, 3,699 varas, to the place of beginning—all of which being fully made known by the writings and evidence aforesaid, and by the confession of the parties in open court:

It is therefore considered, adjudged, and decreed by the court, here, that the above and foregoing seven hundred and sixty-three acres of land as above described be, and the same is hereby, adjudged and decreed to be the property of the said Richard Goode, as against the said Lapsley, he forever quitting claim to said lands, his heirs and assigns forever, and that the said lands be and remain the property of the said Goode and his heirs and assigns forever. It is further adjudged and decreed that the said Goode has forever quit-claimed to the said Lapsley all his right, claim, & interest in and to the following tract
16 or parcel of land, to wit, the back end of said league, heretofore his claim and possession, as well as to all the balance of said Dillard league, and that the court adjudges and decrees the same unto

said Lapsley, his heirs and assigns, as against the said Goode, his heirs forever.

It is further considered, adjudged, and decreed that this suit as against Goode is ended and determined, and that the said Lapsley is to pay three-fourths of the costs herein, and that Goode is to pay the ballance, & that execution issued therefor.

Order continuing case.

In district court, McLennan County. Fall term, A. D. 1865. November the 23rd, 1865.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } No. 1093.

In this cause the presiding judge being of counsel, this cause is continued until the next term of the court.

Order of court.

In district court, McLennan County. Spring term, 1866. May 23d, 1866.

This case coming on to be heard, it is continued under former order, to wit, the presiding judge having been of counsel.

Order of court.

In district court, McLennan County. Fall term, 1866. November the 8th, 1871.

JOHN W. LAPSLEY
vs.
17 N. A. MCPHAUL ET ALS. }

The presiding judge having been of counsel, this cause is continued.

Order of court.

In dist. court, McLennan Co., spring term, 1867. May the 30th, 1867.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

Continued under the former order of the court.

Order of continuance.

In district court, McLennan County. Fall term, 1867. November the 27th, 1867.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

The presiding judge having been of counsel, this cause is continued by operation of law.

Order of continuance.

In district court, McLennan Co. Fall term, 1868. January 1st, 1869.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

Presiding judge having been of counsel, this cause is continued.

Order c't fall term, 1869.

In district court, McLennan County. Fall term, 1869. December 7th, 1869.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

Presiding judge recused.

18 In district court, McLennan County. Spring term, 1870. June 1st, 1870.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. }

Leave given the plaintiff to amend, and alias citation to N. A. McPhaul, & cause continued.

Answer of def't McPhaul pro se and children, filed 22nd Nov., 1870; *and answer of Ann E. Tipton for herself & minor children.*

THE STATE OF TEXAS,
McLennan County:

In dist. court. November term, 1870.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1093.

Now, at this term of the court, comes Neill A. McPhaul, one of the defendants in the above cause, in his own right, and as the natural guardian and next friend of his minor children, to wit, John McPhaul, 9 years old; Henry McPhaul, 7 years old; and Alice McPhaul, 5 years old, all children of him, the said N. A. McPhaul, by his wife, Sarah A. McPhaul, formerly Sarah A. Fleming, daughter of Peter & Ann Fleming, deceased, and suggests the death of his said wife, Sarah A., who departed this life in 1868, leaving as her only children & heirs himself and the said above children; and also comes Mrs. Ann Eliza
19 Tipton, widow of Isham Tipton, deceased, and formerly Ann

Eliza Fleming, daughter of Peter and Ann Fleming, deceased, and says that her husband is dead, and died 1868, leaving her as widow, and that she and the said Isham are the mother & father of the following children, and none other, to wit: Ellen Tipton and Annie Tipton and James Tipton, respectively, five, seven, and three years old, and herself a party to this suit, and also makes herself, as the natural guardian and next friend of said minors aforesaid, a party for them and with them to this suit, and, answering to the complainant, says:

1st. The matters and things in said petition are not sufficient in law to have and maintain this action; and ask judgment of the court.

EVANS & DAVIS,
For Def'ts.

2nd. And, answering hereto, they allege & say:

That, in the year 1835, the government of Coahuila and Texas granted to Peter Fleming, long since deceased, the following league of land, to wit: One league now situated in McLennan County, Texas, opposite the town of Waco, containing 4,428 acres of land, and described as follows, to wit: Beginning at the upper corner of league No. 2nd; from thence north 60° east 9,423 varas to a stake on the line of said league No. 2, from which an elm 16 inches bears 72° E. 3 varas, and another bears north 85° west 14 varas; from thence north 30° 2,500 varas to a stake in the prairie, from which a mesquite 15 inches in diameter bears north 57° east 33 varas; from thence south 60° W. 10,423 varas to a stake on the bank of the Brazos River, from which a cottonwood 25 in. in diameter bears west 8 varas, and a hackberry 18 inches in diameter bears S. 78 E. 9 varas; from thence with the bank of the river, following the meanders of the same, to the place of beginning.

And defendants aver that at the filing of this petition *that* the said Sarah A. McPhaul, Ann E. Tipton, and Mrs. Ann Delk, formerly Mrs. Ann Flemming, wife of Peter Flemming, who makes herself party hereto, were the sole surviving heirs at law of Peter Fleming, who also died many years ago, and, as such, were the legal owners of said league of land aforesaid, and in the bona-fide and actual possession of the same and every part thereof, living upon and cultivating the
21 same and every part thereof, and that they and their ancestors have been so possessed for more than thirty years.

And defendants aver that, in addition thereto, the said Sarah A. McPhaul and Ann E. Tipton, in order to perfect and render beyond question their title to said league of land, and, finding outstanding a claim of title in one Tomas de la Vega, of the city of Saltillo, they did purchase of and from him his claim or title to the said league of land.

And defendants aver that they set up and claim no title or possession of any of the lands described in plaintiff's petition, save and except the lands set out herein by metes & bounds, and that none of the other defendants herein are in possession thereof or claim title to any part of the league here claimed by them; and they here plead seperately their rights, and demand trial thereof; &, as in duty bound, &'.

And defendants aver that none of the wrongs, injuries, & trespasses complained of in plaintiff's petition are they guilty; & put themselves upon the country.

And defendants aver that at the filing of this suit, and long before and at this time, *that* they and their ancestors were and are in the peaceable, quiet, and actual possession of the aforesaid and
22 above-described league of land, and every part thereof; and

they here plead and set out & set up their title to said land by way of plea in reconvention, and pray for an order and decree declaring their title good, valid, and binding against all the world, and especially against the said John W. Lapsley, and all persons claiming by, through, or under him said land, or any part thereof, and order to them their writ of institution therefor. As in duty bound they will ever pray.

A. J. EVANS,
For Defendants.

And now also comes Thomas de la Vega, a resident citizen of Saltillo, in the Republic of Mexico, and saith that he is the vendor of the above defendant', Sarah A. McPhaul, heirs, and Mrs. Ann E. Tipton, and having himself perfect title from the Government, dated in 1833, to eleven leagues of land originally granted to him, did, in 1860, [50] convey the said above-described one league of land, described in said defendants' answer to said Sarah A. McPhaul, in her life-time, and to Mrs. Ann E. Tipton, and gave them a warranty deed therefor, and that said league, so described, is within said eleven leagues aforesaid;
23 and therefore make himself a party hereto, and asks to defend his title and warranty, & adopts so much of the answer of the above defendants as is necessary for the purpose, & prays for decree confirming title in said defendants.

A. J. EVANS,
W'M ALEXANDER,
Att'ys for La Vega.

Upon which foregoing answers was endorsed the file-mark of the clerk in the following words, to wit: "Filed Nov. 22nd, 1870. D. F. Davis, clerk, by S. A. Beavis, dep'ty.

Order court, April term, A. D. 1871.

In district court McLennan County. April term, 1871. April 27th, 1871.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS.

In open court the death of the following-named defendants, to wit:

suggested and scire facias ordered to the legal representation of said decedents, in terms of the law, & cause continued for service.

Pl'ff's petition to remove case to circuit court U. S.—Filed Aug. 7th, 1871.

In district court McLennan Co.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. No. 1093.

To Hon. Jno. W. Oliver, dist. judge, presiding:

The petition of John W. Lapsley, a citizen of the State of Alabama, and the plaintiff in the above styled and number' cause, *presi*ding in

your hon'l district court for the county of McLennan, respectfully represents unto your honor that petitioner is desirous of removing said cause to the circuit court of the United States for the western district of Texas, and as containing sufficient reasons for said removal here refers to and adopts as a part of this petition the sworn statements of petitioner, made before B. F. Soffold, justice of the supreme court of the State of Alabama, on the 24th day of July, 1871, and again sworn to by petitioner on the 25th day of July, 1871, before George H. Patrick, U. S. commissioner for the middle district of Alabama, which statements, under oath, together with all the certificates attached and herewith filed, marked Exhibit "A," as part of this petition.

Petitioner here tenders a bond, with good and sufficient security, that he will enter in the next circuit court of the United States for the western district of Texas, on the first day of its session, copies of all pleadings, process, depositions, testimony, and other proceedings in said
25 *said* cause, and that he will do all other things appropriate to be done upon the removal of a cause from a State court to the circuit court of the United States, which said bond is herewith filed, marked "B." Petitioner aver' that the land in dispute in said cause exceeds in value the sum of five hundred dollars, exclusive of costs, and that the def'ts therein are citizens of the State of Texas, and petitioner refers to his pleadings on file in said case for a description of the lands in controversy, and of the nature of the suit, and prays that your honor enter and order removing said cause to the next circuit court of the United States to be held in the western district of Texas, to be there tried and adjudicated.

COKE, HERRING & ANDERSON, *For Lapsley.*
NORRIS & SLEEPER.

Upon the foregoing petition was endorsed the file-mark of the clerk, as follows, to wit:

"Filed Aug. 7th, 1871. D. F. Davis, clerk D. C. McL. Co., Texas, by Jno. L. Dyer, deputy."

Affidavit—Exhibit "A" referred to in foregoing petition.—Filed Aug. 7th, 1871.

THE STATE OF ALABAMA,
County of Montgomery:

26 Before me, the undersigned B. F. Soffold, a judge or justice of the supreme court of the State of Alabama, this day personally appeared John W. Lapsley, a citizen of the State of Alabama, and residing in the county of Shelby therein, and to me well known, who, upon being first by me duly sworn, d*is*poses and says: I, the affiant, John W. Lapsley, and a citizen of Shelby County, in the State of Alabama, and plaintiff in a suit now pending in the district court of McLennan County, and State of Texas, being No. 1093 on the docket of said court, wherein N. A. McPhaul and Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathaniel White, and Edmund Smith were sued as defendants in action of trespass to try title to the eleven leagues of land lying in said McLennan County, State of Texas, originally granted by the government to Thomas de la Vega, the value of which land affiant deposes and says exceeds the sum of five hundred dollars, exclusive of costs. Affiant further states that he has reason to

and does believe that, from prejudice and from local influence,
27 he will not be able to obtain justice in said cause in the district court of McLennan County, State of Texas, where the same is now pending.

Wherefore, the affiant makes this affidavit for the purpose of procuring the removal of said suit to the circuit court of the United States for the western dist. of Texas. The word "Dallas" stricken out and "Shelby" inserted twice on the first page of the affidavit before signing or swearing to the same.

JOHN W. LAPSLEY.

Sworn to and subscribed before me July 24th, 1871.

B. F. SAFFOLD,
Justice of the Supreme Court of Alabama.

THE STATE OF ALABAMA,
County & City of Montgomery:

I, D. B. Booth, clerk of the supreme court of the State of Alabama, sitting in the county and city aforesaid, which is a court of record, hereby certify that B. F. Saffold, whose name, is subscribed to the foregoing and above-written certificate touching the affidavit of John W. Lapsley, hereinabove written, is, and was at the signing of the said certificate, a judge of the said supreme court; that his signature
28 as such to said certificate is his genuine signature, and that his said certificate is in due form of law, and is entitled to full faith and credit.

In testimony whereof I, the clerk of the said supreme court, have hereto subscribed my name and affixed the seal of said court, the same being in my official custody, at my office in the county, city, and State aforesaid, this 24th of July, 1871.

Geo. H. Patrick, U. S. commissioner mid. dist. Alabama.

[L. S.] D. B. BOOTH, *Clerk.*

THE STATE OF ALABAMA,
County and City of Montgomery:

I, George H. Patrick, a commissioner of bail and affidavit of the circuit court of the United States for the middle district of Alabama, hereby certify that John W. Lapsley, a citizen of said State, to me well known, and residing in the county of Shelby, in said State, appeared before me this 25th day of July, A. D. 1871, and, being, by me duly sworn, deposeth and saith as follows, to wit: That the matters and things stated and set forth in the annexed affidavit made by him under date of July 24th, 1871, before and certified by D. F. Saffold, a judge
29 or justice of the supreme court of said State of Alabama, with the certificate of the clerk of said court written thereunder, which affidavit is made for the purposes therein stated, are all true in substance and fact as therein set , and that he, said affiant, now here, makes oath before said commissioner to the truth of the said annexed affidavit, and of all the matters and things therein stated and set forth, constituting his said affidavit, and now here and hereby ma's oath before the undersigned commissioner that the said affidavit and the matters therein stated, as stated and sworn to by him, are true in substance and in fact.

Geo. H. Patrick, U. com. mid. dist. Ala.

JOHN W. LAPSLEY.

Sworn to and subscribed before me, commissioner as aforesaid, this 25th day of July, A. D. 1871.

GEO. H. PATRICK,
U. S. Commissioner Mid'le District of Alabama.

THE STATE OF ALABAMA,
County and City of Montgomery:

I, Elliott C. N. Blake, clerk of the district court of the United States in and for the middle district of Alabama, hereby certify that George
30 H. Patrick, of the State, city, and county aforesaid, who is to me well known, and whose certificate as commissioner of bail and affidavit of the circuit court of the United States for the middle district of Alabama is set forth above, under date of July 25, 1871, is, and was at the date of said certificate, commissioner of bail and affidavit for the circuit court of the United States for the middle district of Alabama, and that his acts and certificates are entitled to full faith and credit, as shown from the records of said district court in my custody officially.

In testimony whereof I, the said clerk, have hereto subscribed my name and affixed the seal of said court. Thus done at my office in the State, county, & city aforesaid this 25th July, A. D. 1871.

E. C. N. BLAKE,
Clerk U. S. District Court, Middle District of Alabama.

Upon the foregoing Exhibit A was endorsed the clerk's file-mark, as follows: "Filed Aug. 7th, A. D. 1871. D. T. Davis, cle'k D. C. McL. Co., by John L. Dyer, deputy."

31 *Bond—Exhibit "B" refer'ed to in foregoing petition, filed Aug. 7th, 1871.*

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } No. 1083. Suit pending in dist. court McLennan County.

We, John W. Lapsley, as principal, and T. J. League and C. G. Wills, as sureties, do promise & bind ourselves to pay to N. A. McPhaul and others, the defendants in the above styled and numbered suit, pending in the district court of McLennan County, the sum of one thousand dollars, conditioned to be void of the said John W. Lapsley, plaintiff in said suit, shall enter in the next circuit court of the United States to be held in and for the western district of Texas, on the first day of its session, copies of all the process, pleadings, depositions, testimony, and other proceedings in said above entitled and numbered suit, and shall do all other things that are required by law to be done upon the removal of said above entitled and numbered cause from the district court of McLennan County, Texas, to the circuit court of the United for the western district of Texas; otherwise to remain in full force.

Given under our hands & scrawls for seals, this 7th August, 1871.

JOHN W. LAPSLEY, [SEAL.]
Per agent, RICH'D COKE.
T. J. LEAGUE, [SEAL.]
Per agent RICHARD COKE.
C. G. WILLS, [SEAL.]
Per RICH'D COKE, *Agent.*

32 Upon which aforesaid bond was endorsed the file-mark of clerk, as follows: "Filed Aug. 7th, 1871. D. F. Davis, cl'k D. C. McL. Co., by Jno. L. Dyer, deputy."

Order of court removing cause to circuit court U. S., &c.

In district court McLennan County, August term, 1871.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS.

On this the tenth day of August, A. D. 1871, the petition of John W Lapsley, a citizen of the State of Alabama, and plaintiffs in the above cause, praying, for reasons set forth therein and in the affidavit accompanying the same as an exhibit, a removal of this cause to the circuit court of the United States for the western district of Texas, coming on to be heard, and the bond and security tendered by said Lapsley in his said petition being good, and accepted and approved by the court, and it appearing to the court that the prayer of said petition should be granted—

It is, therefore, ordered and adjudged by the court that the prayer of said petition be in all things granted, and that this cause be removed to the next circuit court of the United States to be held
33 in the western district of Texas, and that for this purpose the clerk of this court is hereby ordered to make out and deliver to John W. Lapsley, or his attorney of record, certified copies of all process, pleadings, depositions, testimony, and other proceedings filed in this cause, the same to be by said Lapsley filed in said circuit court of the United States on the first day of its term.

It is further ordered that said Lapsley pay all costs incurred in this court, and that a certified copy of the bill of costs so paid be sent, with the other papers, to said circuit court of the United States.

In district court McLennan Co., Texas.

JNO. W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. No. 1083.

Bill of costs.

Clerk's costs:

Fil. & docket'g suit	$ 40
" 6 papers, 15 c't	90
3 appearances	60
1 judgment	75
8 orders court	6 00
8 continuances	2 00
Tax. costs, & copy	50
Transcript	20 00
Due clerk	$31 15
Jury fees	5 00
Total	36 15

Sheriff's costs—none taxed.

34 STATE OF TEXAS,
County of McLennan:

I, D. F. Davis, clerk of the district court of McLennan County, Texas, do hereby certify that the foregoing 41 pages contain a full, true, and correct transcript of the record and copy of all process, pleadings, depositions, testimony, and other proceedings had in case No. 1093, wherein John W. Lapsley is plaintiff & N. A. McPhaul et als. are defendants.

In testimony whereof I hereunto set my hand and the impress of the seal of the district court of McLennan County, Texas, at office in the city of Waco, in said county and State, this the 2nd day of October, A. D. 1871.

[L. S.]

D. F. DAVIS,
Clerk D. C. McL. Co., Texas.
By JNO. L. DYER, *Deputy.*

35 And afterwards, to wit, on January 16th, 1872, the following notice was filed—endorsed, to wit: "No. 1184. John W. Lapsley vs. N. A. McPhaul et al. Filed January 16th, 1872. M. Hopkins, clerk. Marshal's return"—in words to wit:

Se'vice.

Rec'd Jan'y 18, A. D. 1872, and executed the same day by handing to the within-named defendant in person, to whom this notice is directed, a true copy of the said notice.

Marshal's fee, $2.00; 1 mile, 10—$2.10.

THO'S F. PURNELL, *U. S. M.*,
By S. R. EVANS, *Deputy.*

Notice to N. A. McPhaul, as next friend and natural guardian of minors John, Henry, & Alice McPhaul, and is in words to wit:

Notice of filing of deeds to N. A. McPhaul.

Filed January 16th, 1872.

M. HOPKINS, *Clerk.*

In U. S. cir. c't west dis't. Texas, at Austin. January term, A. D. 1872.

JOHN W. LAPSLEY, PL'FF,
vs.
N. A. McPHAUL, SARAH McPHAUL, ISHAM TIPton, Ann E. Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathaniel White, and Edmund Smith. } No. 1184.

To N. A. McPhaul, next friend and natural guardian of the minors John McPhaul, Henry McPhaul, and Alice McPhaul:

You will please take notice of the filing of the following deeds, documents, papers, transfers, bonds, and other instruments in the above-entitled case, to be used as evidence on the part of plaintiff on the trial thereof:

First. A testimonio of a power of attorney from Thomas Vega, José Maria Aguirre, and Rafael Aguirre, the said power of attorney
36 being to Samuel May Williams, dated the fifth day of May, A. D. 1832, the said testimonio being executed by Juan Gonzales with

his proper assisting witnesses, and duly recorded in the counties of Falls and McLennan, in the State of Texas, after being proved.

Second. A deed of Tomas de la Vega, by his attorney in fact, Samuel M. Williams, for eleven leagues of land, to M. B. Menard and Nathaniel F. Williams, in trust for Mrs. Sophia J. St. John, dated the first day of May, A. D. 1840, duly acknowledged and recorded in the counties of McLennan and Limestone, in the State of Texas.

Third. Release from Tomas de la Vega, by his attorney, Samuel M. Williams, of date first day of July, A. D. 1850, to Sophia J. St. John for the same land, duly acknowledged and recorded in the county records of McLennan, State of Texas.

Fourth. Deed for the same land from Nathaniel F. Williams and M. B. Menard, acting in the capacity as the trustees of Sophia J. St. John, and, at her request, to Thomas M. League, dated the first day of July, A. D. 1850, duly acknowledged and recorded in the county of McLennan, State of Texas.

Fifth. Deed for the same land from M. B. Menard and Nathaniel
37 F. Williams, trustees of Sophia J. St. John, to Thomas M. League, dated the first day of July, A. D. 1850, and duly acknowledged.

Sixth. Deed of ratification by Sophia J. St. John, concurred in by her husband, Samuel St. John, j'r, to Thomas M. League, of the two deeds mentioned in subdivisions 4 and 5, dated nineteenth day of August, A. D. 1850, and duly acknowledged.

Seventh. Deed for the same land from Sophia J. St. John and Samuel St. John, j'r, by their agent and attorney, Jacob de Cordova, to Thomas M. League, dated 1st day of July, A. D. 1850, and duly acknowledged.

Eighth. Deed from Thomas M. League for the same land to John W. Lapsley, dated the first day of July, A. D. 1850, and duly acknowledged and recorded in the county of McLennan, State of Texas.

Ninth. Deed of confirmation from Sophia J. St. John to Thomas M. League, confirming the sale of said land as made to the said Thomas M. League, (and quit-claiming to him, said League,) by her trustees, M. B. Menard and Nathaniel F. Williams, dated the eighth day of July, A. D. 1850, and duly acknowledged and recorded in the county of McLennan, State of Texas.

38 Tenth. Deed from Thomas M. League for the same land to John W. Lapsley, dated 9th day of July, A. D. 1850; all of which are original papers.

RICH'D COKE, AND F. H. SLEEPER, AND
W. M. WALTON, *Att'ys for Plaintiff.*

And afterwards, to wit, on January 16, 1872, the following notice was filed to R. N. Goode, and is endorsed in words, to wit: "No. 1184. John W. Lapsley vs. N. A. McPhaul et al. Service. Notice to defendant R. N. Goode. Filed January 16th, 1872. M. Hopkins, clerk:" And is in words, to wit:

39 In U. S. cir. c't west. dist. Texas, at Austin. January term, A. D. 1872.

JOHN W. LAPSLEY, PL'FF,
vs.
N. A. MCPHAUL, SARAH MCPHAUL, ISHAM TIPTON, Ann E. Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathaniel White, and Edmund Smith. } No. 1184.

To the def't R. N. Goode:

You will please take notice of the filing of the following deeds, documents, papers, transfers, bonds, and other instruments in the above-entitled case, to be used as evidence on the part of plaintiff on the trial thereof:

First. A testimonio of a power of attorney from Tomas Vega, Jose Maria Aguirre, and Rafael Aguirre, the said power of attorney being to Samuel May Williams, dated the fifth day of May, A. D. 1832, the said testimonio being executed by Juan Gonzales with his proper assisting witnesses, and duly recorded in the counties of Falls and McLennan, in the State of Texas, after being proved.

Second. A deed from Tomas de la Vega, by his attorney in fact, Samuel M. Williams, for eleven leagues of land, to M. B. Menard
40 and Nathaniel F. Williams, in trust for Mrs. Sophia J. St. John, dated the first day of May, A. D. 1840, duly acknowledged and recorded in the counties of McLennan and Limestone, in the State of Texas.

Third. Release from Tomas de la Vega, by his attorney, Samuel M. Williams, of date first day of July, A. D. 1850, to Sophia J. St. John, for the same land, duly acknowledged and recorded in the county records of McLennan, State of Texas.

Fourth. Deed for the same land from Nathaniel F. Williams and M. B. Menard, acting in the capacity as the trustees of Sophia J. St. John, and, at her request, to Thomas M. League, dated the first day of July, A. D. 1850, duly acknowledged and recorded in the county of McLennan, State of Texas.

Fifth. Deed for the same land from M. B. Menard and Nathaniel F. Williams, trustees of Sophia J. St. John, to Thomas M. League, dated the first day of July, A. D. 1850, and duly acknowledged.

Sixth. Deed of ratification by Sophia J. St. John, concurred in by her husband, Samuel St. John, j'r, to Thomas M. League, of the two deeds mentioned in subdivisions 4 and 5, dated nineteenth day of August, A. D. 1850, and duly acknowledged.

41 Seventh. Deed for the same land from Sophia J. St. John and Samuel St. John, j'r, by their agent and attorney, Jacob de Cordova, to Thomas M. League, dated first day of July, A. D. 1850, and duly acknowledged.

Eighth. Deed from Thomas M. League, for the same land, to John W. Lapsley, dated the first day of July, A. D. 1850, and duly acknowledged and recorded in the county of McLennan, State of Texas.

Ninth. Deed of confirmation from Sophia J. St. John to Thomas M. League, confirming the sale of said land as made to the said Thomas M. League, (and quit-claiming to him, said League,) by her trustees, M. B. Menard and Nathaniel F. Williams, dated the eighth day of July, A. D. 1850, and duly acknowledged and recorded in the county of McLennan, State of Texas.

Tenth. Deed from Thomas M. League, for the same land, to John W. Lapsley, dated the ninth day of July, A. D. 1850; all of which are original papers.

RICH'D COKE,
F. H. SLEEPER, AN'
W. M. WALTON,
Att'ys for Pl'ff.

The marshal's return of service on copy is endorsed on original notice in words, to wit:

42 Rec'd on the 18th day of January, A. D. 1872, and executed the same day, by delivering to the def't in person, to whom 'is notice is directed, a true copy of the same.

THO'S F. PURNELL,
U. S. Marshal W. D. T.,
By S. R. EVANS, *Deputy.*

Marshal's fee, $2.00.

And afterwards, to wit, on February 2, 1872, the defendant N. A. McPhaul, filed the following motion, endorsed: "Filed Feb. 2, 1872. M. Hopkins, clerk:"

And is endorsed in words, to wit: "No. 1184, (No. 1093.) John W. Lapsley vs. N. A. McPhaul et al. Filed February 2, 1872. M. Hopkins, clerk:"

And is in words, to wit:

Motion of N. A. McPhaul to dismiss.

Filed Feb. 2, 1872.

M. HOPKINS, *Clk.*

In U. S. cir. court west. dist. Texas. At January term, 1872.

JOHN W. LAPSLEY, PL'FF, *vs.* N. A. McPHAUL, SARAH McPHAUL, ISHAM TIPton, Annie Eliza Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckie, Nathan White, & Edward Smith, def'ts.	No. 1184, (1093.)

43 Now comes the defendant N. A. McPhaul, in his proper person, (but not as the next friend and natural guardian of his minor children, John, Henry, and Alice McPhaul, because by the laws of the State of Texas, now in force, the said minors are required to be represented by a special guardian, appointed and bonded by the court, and because he is not such special guardian, appointed and bonded by the court, nor is he the duly appointed and bonded guardian of such minors, and notifying the court of the true status of said minors, prays the necessary orders for their proper representation in th.s court,) and, thus appearing, with due respect submits this his motion and prays the court to dismiss this cause from the docket of this court, at the costs of the said pl'ff: Because,

1st. The transcript, as herein filed, shows no grounds under the law for the jurisdiction of this court.

2nd. The said pl'ff, John W. Lapsley, did and does fail to enter in the next circuit court of the United States to held in and for the western district of Texas, on the first day of its session, to wit, on the 1st Monday in January, 1872, copies of all process, pleadings, depo-
44 sitions, and testimony, and other proceedings in said above cause, meaning in cause No. 1093, then, to wit, the 7th day of August, A. D. 1871, pending in McLennan County.

And in support of this 2nd ground of motion to dismiss he here submits the affidavit of E. J. Evans, one of his attorneys in fact and of record in this cause, and makes the same a part hereof, marked "Exhibit A."

Before me, Matthew Hopkins, clerk of the United States circuit court in and for the western district of Texas, this day came A. J. Evans and, being duly sworn, saith that he is one of the attorneys of record for Neill A. McPhaul in a certain matter or cause wherein John W. Lapsley is plaintiff and Neill A. McPhaul and others are defendants, pending in the honorable district court of McLennan County, Texas, on the 7th day of August, 1871, and numbered on said docket No. 1093, and of which cause the said Lapsley now in this proceeding seeks to have this court to take jurisdiction & try; and that he as the attorney of said McPhaul did cause to be filed in said aforesaid cause No.
45 1093, then pending in the said honorable district court of McLennan , Texas, by the clerk of said district court, the following instruments and papers, to be used as testimony on the trial of said cause, to wit:

First. A certified land-office copy of the original grant of eleven leagues of land by the government to Tomas de la Vega.

Second. A certified copy of an original power of attorney from Tomas de la Vega to Simon Mussina, of date Nov. 12th, 1859, and of the substitution of Wm. Alexander by said Mussina, of date Jan. 3rd, 1860, with an original affidavit of Neill A. McPhaul, accounting for the non-production of the original papers.

Third. Original warranty deed from Tomas de la Vega, by his attorney, W'm Alexander, to Sarah A. McPhaul and Eliza Tipton.

Fourth. Certified land-office copy of a grant of 1 league to Peter Flemming.

Fifth. Original notice of the filing of the above papers and the acceptance of notice by Coke, Hering & Anderson, and Sleeper & Norris.

46 Affiant saith further that all of said papers were filed in said clerk's office aforesaid on the 26th day of Dec., 1870; and affiant says that they were so filed in causes No. 1093, 1094, 1194, & 1843; 1093 of John W. Lapsley vs. N. A. McPhaul et al.; 1094, of John W. Lapsley vs. N. A. McPhaul et al.; 1194, of J. M. Norris vs. N. A. McPhaul, and in other causes involving the same or similar issues pending in said district court. Affiant avers that the copies or transcript of said cause No. 1093, filed in this cause, upon inspection, contains no transcript or copy of such papers, or any one of them, and no reason for not giving the same.

A. J. EVANS.

Sworn to and subscribed this 2d February, 1872.

M. HOPKINS, *Clerk.*

For the foregoing and other causes and reasons upon the face of the record before the court we pray the dismissal.

NEIL A. McPHAUL,
By att'y, A. J. EVANS.

And afterwards, to wit, on the 3d day of February, 1872, the following entry appears on the minutes of the court, to wit:

Plaintiff dismisses as to all the defendants except N. A. McPhaul.—Ent'r'd Feb. 3d, 1872.

SATURDAY MORNING, *Feb.* 3, 1872.

J. W. LAPSLEY
vs.
N. A. MCPHAUL ET ALS. } 1184.

And now comes the plaintiff in this cause, by his attorneys, W. M. Walton & F. H. Sleeper, and dismisses his suit as to the defend-
47 ants Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathaniel White, and Edmund Smith.

It is therefore considered by the court that this cause be, and the same is hereby, dismissed as to the said-named defendants.

It is further considered by the court, and hereby ordered and adjudged, that the officers of court do have and recover of and from the plaintiff their costs in this behalf incurred in the prosecution of this suit against the said-named defendants, for which execution may issue.

And now came also the defendant, N. A. McPhaul, by his att'y, A. J. Evans, and move the court to dismiss this cause, because the record is incomplete, as appears from the affidavit of A. J. Evans, on file, which motion was overruled, and the defendant excepted.

And the parties announcing themselves ready for trial, came also a jury, to wit, John H. Walker and eleven others, who, being duly tried, empannelled, and sworn, upon the pleas and issues joined, the case proceeded until the hour of adjournment.

[Written on the margin:]

Judge's entry.—Docket entry.

FEB. 2, 1872.

Motion to dismiss overruled. Marriage of Ann Eliza Tipton with Rob't Wright suggested. Death of Ann Delk suggested. (See note by the clerk, p. 47½.)

47½ *Note by the clerk.*

It is the duty of the clerk "seasonably to enter."

The docket-entry in the margin of the preceding page, although made by the judge as of "Feb. 2," was really made on Feb. 3d. Consequently, no entry on the minutes of the 2d appeared of the suggestions of death and marriage, for no suggestions of death or marriage were made on that day. And on the 3d of February the clerk made no entry on the minutes which appeared on the docket as of the 2d, and the error was not perceived by the clerk until the call made by the defendant McPhaul for the record to accompany his writ of error, and is thus corrected.

And on the same day, to wit, Feb. 3d, 1872, the following affidavit of S. Mussina was filed, endorsed, to wit: "No. 1184. John W. Lapsley vs. N. A. McPhaul et al. Affidavit of forgery. Filed February 3, 1872. M. Hopkins clerk:" And is in words, to wit:

48 *Affidavit of forgery.*

Filed Feb. 3, 1872.

M. HOPKINS, *Clk.*

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } No. 1184.

Filed February 3, 1872.

M. HOPKINS, *Clerk.*

And is in words, to wit:

In the U. S. dist. court in and for the western district of Texas.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL. } No. 1184.

Now comes Simon Mussina, attorney for Tomas de la Vega, & saith that a certain instrument of writing purporting to be a testimonio or second original of a power of attorney purporting to have been executed by Tomas de la Vega, signing as Thomas Vega, to Samuel May Williams, of date May 5th, 1832, a forged instreument of writing, as he does verily believe.

SIMON MUSSINA.

Sworn to and subscribed before me this Feb. 4th, 1872.

M. HOPKINS, *Clerk.*

And afterwards, to wit, on February 5th, 1872, the plaintiff makes the following motion to strike out, and is endorsed in words, to wit: "Lapsley vs. McPhaul et al. Motion to strike out. Filed Feb'y 5th, 1872. M. Hopkins, cl'k:" And is in words, to wit:

49 JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL.

And now comes the pl'ff and moves the court to strike out & disregard the affidavit of S. Mussina, filed in this case on the 4th inst., al'edging the testimonio of a power to sell from Tomas Vega to Samuel May Williams, of date 5th May, 1832, to be forged,

1. Because the same was made & filed in this case after all parties had announced ready for trial.
2. Because it was made and filed in this case more than one entire day after the filing of said testimonio in court.
3. Because it was made and filed in this case more than one entire day after the principal defendants had been duly notified under the statute of the filing of said testimonio in court.
4. Because the said Vega, in whose behalf the said affidavit is pretendedly made is an intervenor in the case, and cannot be heard to make this affidavit under the circumstances of this case, the said circumstances being of record in this case.
5. Because all the questions raised by said affidavit are res

50 adjudicata as between the said Vega and his privies, which adjudication is of record in this court, in case No. 37, chancery, between Tomas de la Vega, complainant, vs. John W. Lapsley & others, to which reference is here made, and leave asked to refer thereto and to all parts thereof as often as may be necessary for the purposes of this motion.

F. H. SLEEPER &
W. M. WALTON,
For Pl'ff.

And on the same day, to wit, February 5th, 1872, the following entry appears upon the minutes of the court, to wit:

Entries minutes Feb. 5, 1872.

MONDAY MORNING, *February 5th*, 1872.

JOHN W. LAPSLEY, PL'FF,
vs.
N. A. MCPHAUL. } 1184.

And now on this day came the parties, by their attorneys, and the panel of jurors sworn and charged in this case being called, it was made known to the court that one of the jurors was sick and confined to his bed, and would not be able to attend upon the court for several days. Thereupon the court discharged the jury from the further consideration of the cause.

And on the same day the following entry appears:

JOHN W. LAPSLEY, PL'FF,
vs.
N. A. MCPHAUL, DEF'T. } No. 1184.

And now comes the pl'ff, by his att'ys, and the defendant, by his att'ys, and announcing themselves ready for trial upon the pleas and
51 issues joined, came a jury of twelve good and lawful men of the western district of Texas, duly tried, empanelled, and sworn, to wit: O. H. Millican and eleven others, and the case proceeded until the hour of adjournment, when the jury having been cautioned by the court to hold no communication with each other, or with any one else, in reference to this cause, they were ordered to attend promptly to-morrow morning, at ten o'clock, to which hour court was ordered adjourned.

And afterwards, to wit, Tuesday morning, Feb. 6, 1872, the following entry appears on the minutes of the court:

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL. } No. 1184.

And now came the parties, by their att'ys and the jury empanelled in the cause, and the case was argued by counsel, and the jury, having been charged by the court, retired to consider of their verdict; and on the following day, to wit, Wednesday, 7th, returned into court the following verdict, to wit:

"No. 1184. We, the jury, find for the plaintiff, and assess the damages to be five hundred dollars.

O. H. MILLICAN, *Foreman.*"

It is therefore ordered, adjudged, and decreed by the court that the plaintiff, John W. Lapsley, do have and recover of the defendant, N. A. McPhaul, the land sued for and described in plaintiff's petition, to wit:

A certain tract or parcel of land, with the appurtenances thereto belonging, lying and situate in the county of McLennan, being the same granted by the proper authorities of Coahuila and Texas to
52 Tomas de la Vega, on the day of , 18 , and containing eleven square leagues of land, and bounded and described as follows, to wit: Beginning at Robert Barr's N. W. corner of three-league survey on Brazos, a stake bearing N. 75° W., $12\frac{1}{10}$ varas, from a box-elder 6 inches in diameter; thence up the Brazos with its meanders 14,080 varas, on a right line with general course of said river, to a stake bearing S. 9° E., $2\frac{2}{10}$ varas, from a cottonwood18 inches in diameter; thence N. 62° E., 22,953 varas to a stake in prairie; thence S. 28° E., 14,180 varas, to stake on Rob't Barr's north boundary of 3 leagues; thence S. 62° W., 17,093 v'r's to place of beginning, crosses main Tehuacana Bayou 167.34 varas, or at 360 v'r's from main river. Including the following-described tract of land set out in plaintiff's petition, to wit: Beginning at a stake, the point "A," on the Eldy line of W. R. Kellum's survey, where the upper line of la Vega eleven-league grant crosses the same, being the N. W. corner of 202-acre survey made for Mrs. E. V. Goode, from which a do. 12 inches dia. bears N. 27° E., one vara; do. 10 inches dia. b'rs S. 27° W., 1 vara; thence S. 30° E., 791 varas, to W. R. Kellum's S. E. corner, from which a post-oak, "W," bears E. $3\frac{1}{2}$ varas; thence N. 60° E., 95 varas, the N. corner of Edward Kellum's survey; thence S. 30° E., 570 v'r's, to a stake for S. W. corner of E. V. Goode's survey, from which a musquite, 14 inches dia., b'rs N. 70° E., 9 varas; thence N. 60° E., 853 varas, to a stake set for E. V. Goode's S. E. corner, from which a musquite, 10 in. dia., N. 30° W., 3 varas; thence N. 30° W., 920 varas, to a stake for R. N. Goode's S. W. corner, 128 acres, part of the Morgan 256-acre survey; thence N. 62° E., 1,818 varas, a stake set for S. E. corner of said 128-acre survey, a post-oak, 6 in. in diame-
53 ter, b'rs N. 68 E., 3 v'r's, do. 10 inches in dia., marked X, b'rs S. 10° E., $8\frac{1}{2}$ varas; thence S. 30° E., 400 varas, to S. E. corner of Morgan survey, from which a post-oak, X, 12 in. dia., b'rs N. 67° W., 8 v's, do. 14 inches dia., b'rs N. 34° E., 13 v'rs; thence S. 60° W., 502 v'r's, to a stake set in said Morgan's S. line for N. W. corner of R. N. Goode's 435-acre survey, from which a black-jack, 8 in. in dia., b'rs N. $37\frac{1}{2}$ E., 4 varas, and P. O., 20 in. dia., b'rs S. $41\frac{1}{4}$ W., 19 v'rs; thence S. 30° E., (6 v'r $10\frac{1}{2}$ E.,) 1,174 varas, across Corsicana-road, 1,274 v'r's, set a stake in the S. boundary-line of Diller league for S. E. corner of this survey, from which a post-oak, 14 in. dia., marke' X b'rs N. $9\frac{1}{2}$ W., $17\frac{1}{2}$ v'r's; thence with Diller's line north $58\frac{3}{4}$ E., ("vernier" $10\frac{1}{2}$ E.,) 1,435 to the S. W. corner of a survey made for H. Peters, for S. E. corner of this, from which a post-oak, 6 in. dia., b'rs S. $48\frac{1}{2}$ W., 6 v's, & black-jack, 5 in. dia., b'rs N. 59° E., $1\frac{1}{2}$ v'rs; thence N. 30° W., ("vernier" $10\frac{1}{2}$ E.,) 246 v'r's, Corsicana road 1,977 varas, the S. W. corner of a survey made for Mark Byrd, in the N. E. line of la Vega, for N. E. corner of this survey, from which a post-oak, 12 in. dia., b'rs N. $78\frac{1}{2}$ W. $1\frac{1}{4}$ varas, do. 15 in. dia., b'rs S. 76 E., 5 v'r's; thence S. 62° W., (V. $10\frac{1}{2}$,) with said upper line of la Vega, at 953 varas from the N. E. corner of Morgan's survey, 2,751 v'r's, the N. E. corner of E. V. Goode's survey, 3,699 varas, to the place of beginning:

Together with all his costs in this behalf in and about this suit expended in the behalf of said defendant McPhaul; for which execution may issue.

It is further ordered that the plaintiff, John W. Lapsley, have his writ of possession, directed to the marshal of the district, commanding him to oust, eject, and remove the said N. A. McPhaul and all
54 those holding by, through, or under him since the institution of this suit from the possession of said last-described tract, and to place the plaintiff, his agents, or attorneys, in the quiet and peaceable possession of the same.

It is further ordered that the plaintiff, John W. Lapsley, have and recover of and from the defendant, N. A. McPhaul, the sum of five hundred dollars, pl'ff's damages, so found by the jury, together with his costs in that behalf expended, for which execution may issue.

The charge of the court is in words to wit:

JOHN W. LAPSLEY
vs.
N. A. McPHAUL & OTHERS.

This is an action of trespass to try title, as well as for damages, commenced on the day of , 1863. The suit has been dismissed by the plaintiffs as to all the defendants except N. A. McPhaul.

The jury are instructed that the documents offered in evidence by the plaintiffs, and admitted as testimony by the court, form a chain of title connecting the plaintiff with the sovereignty of the soil, and establish, prima facie, in him the legal title to the land in controversy, at the date of the institution of this suit. McPhaul himself sets up no title to the land sued for, but endeavors to defeat the plaintiff's claim by pleading the outstanding title of Peter Fleming to one league and labor of said land, of which he, McPhaul, claimed to have the possession. But the jury are instructed that this cannot defeat the plaintiff's right to
55 recovery, because the Fleming title is junior in date to that introduced by the plaintiff. The jury will therefore return a verdict generally in favor of the plaintiff, for all the land sued for and described in the petition, unless they believe the testimonio, from the evidence, is a forgery. At the same time the jury will, in finding for the plaintiff, allow him such amount for damages occasioned by trespass of the defendants on his timber as they believe the testimony reasonably entitles him to.

T. H. DUVAL,
U. S. Judge.

56 *Charge asked by defendant, and given.*

In the United States circuit court for the west. dist. of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184.

First. Defendant moves the court to charge the jury specially that the fact that the court has admitted in evidence the testimonio of a power of attorney purporting to have been made by Tomas Vega and

others to Samuel May Williams, does not preclude you from passing upon the genuineness of said instrument in your verdict.

Second. And, further, the fact of the registration of the said aforesaid instrument is prima-facie proof only of its genuineness by the law of the State of Texas; and, further, the fact that the court admitted in evidence the said aforesaid power of attorney does not preclude the defendant from showing, if he can, that the same is a vicious, spurious, and forged document, and if you believe, from the evidence before you, that Tomas de la Vega never did sign the original or protocol from which the testimonio purports to have been made, or that, in fact, no such protocol ever existed, then you will reject said testimonio.

Given. T. H. DUVAL.

See next page for addenda.

57 These charges, prayed for upon the evidence offered under which the said writing was offered and admitted in evidence, to wit, the testimonio or instrument itself; the certificate of authentication and record by the county clerk of McLennan County, Texas; the affidavit of Juan Seguin attached thereto, and the affidavit of James Hewitson attached thereto, and the affidavit of Juan Gonzales attached thereto, and said testimonio and the entire certificates of its authentication and record, and the affidavits of the said Juan Seguin, James Hewitson, and Juan Gonzales are made a part hereof, and to be inserted here in full, and upon this statement of facts, there being no other evidence offered to the court or jury, the defendant asked the above special charges No. 1 & 2.

58 *Defendants' exceptions No. 1.*

In the United States circuit court in and for the west. dist. of Texas.

JOHN W. LAPSLEY *vs.* NEILL A. MCPHAUL ET AL. } No. 1184.

Be it remembered that, upon call of this cause for trial on this day, one of the defendants, Neill A. McPhaul, in his individual capacity, alone appeared and insisted on his motion on this day, (Feb. 2nd, 1872,) filed to dismiss this cause for the reasons therein set out, to wit:

In U. S. c'r court west. dist. Texas, at Austin. January term, 1872.

JOHN W. LAPSLEY, PL'FF, *vs.* N. A. MCPHAUL, SARAH M. MCPHAUL, ISHAM Tipton, Annie Eliza Tipton, R. N. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nathan White, & Edward Smith, def'ts. } No. 1184, (1093.)

Now comes the defendant N. A. McPhaul, in his proper person, (but not as the next friend and natural guardian of his minor children John, Henry, and Alice McPhaul, because by the laws of the State of
59 Texas, now in force, the said minors are required to be represented by a special guardian, appointed and bonded by the court,

and because he is not such special guardian, appointed and bonded by the court, nor is he the duly appointed and bonded guardian of such minors, and notifying the court of the true status of said minors, prays the necessary orders for their proper representation in this court,) and, thus appearing, with, due *due* respect submits this his motion and prays the court to dismiss this cause from the docket of this court at the costs of the said pl'ff: Because,

1st. The transcript as herein filed shows no grounds under the law for the jurisdiction of this court.

2nd. The said pl'ff, John W. Lapsley, did and does fail to enter in the next circuit court of the United States, to be held in and for the western district of Texas, on the first day of its sessions, to wit, on the 1st Monday in January, 1872, copies of all process, pleadings, depositions, and testimony, and other proceeding in said above cause, meaning in cause No. 1093, then pending in McLennan County, to wit, the 7th day of August, A. D. 1871.

60 And in support of this 2nd ground to motion to dismiss, he here submits the affidavit of A. J. Evans, one of his attorneys in fact and of record in this cause, and makes the same a part hereof, marked "Exhibit A."

Before me, Matthew Hopkins, clerk of the United States circuit court in and for the western district of Texas, this day came A. J. Evans, and, being duly sworn, saith that he is one of the attorneys of record for Neill A. McPhaul in a certain matter or cause wherein John W. Lapsley is plaintiff and Neill A. McPhaul and others are defendants, pending in the honorable district court of McLennan County, Texas, on the 7th day of August, 1871, and numbered on said docket No. 1093, and of which cause the said Lapsley now in this proceeding seeks to have this court to take jurisdiction & try, and that he, as the attorney of said McPhaul, did cause to be filed in said aforesaid cause No. 1093, then pending in the said honorable district court of McLennan, Texas, by the clerk of said district court, the following instruments and papers, to be used as testimony on the trial of said cause, to wit:

First. A certified land-office copy of the original grant of eleven
61 leagues of land by the government to Tomas de la Vega.

Second. A certified copy of an original power of attorney from Tomas de la Vega to Simon Mussina, of date Nov. 12th, 1859, and of the substitution of W'm Alexander by said Mussina, of date Jan. 3rd, 1860, with an original affidavit of Neill A. McPhaul accounting for the non-production of the original papers.

Third. Original warranty deed from Tomas de la Vega, by his attorney, W'm Alexander, to Sarah A. McPhaul and Eliza Tipton.

Fourth. Certified land-office copy of a grant of 1 league to Peter Flemming.

Fifth. Original notice of the filing of the above papers, and the acceptance of notice by Coke, Herring & Anderson and Sleeper & Norris.

Affiant saith further that all of said papers were filed in said clerk's office aforesaid on the 26th day of Dec., 1870, and affiant says that they were so filed in causes Nos. 1093, 1094, 1194, & 1843; 1093, of John W. Lapsley vs. N. A. McPhaul et als.; 1094, of John W. Lapsley vs.
62 N. A. McPhaul et al.; 1194, of J. M. Norris vs. N. A. McPhaul; 1843, John W. Lapsley vs. N. A. McPhaul, and in other causes involving the same or similar issues pending in said district court. Affiant avers that the copies or transcript of said cause No. 1093, filed in this

cause, upon inspection, contains no transcript or copy of such papers, or any one of them, and no reason for giving the same.

A. J. EVANS.

Sworn & subscribed this 2nd Feb., 1872.

M. HOPKINS, *Clerk.*

For the foregoing and other causes and reasons, upon the face of the record before the court, we pray the dismissal.

NEILL A. McPHAUL,
By att'y, A. J. EVANS.

And the same being fully considered by the court, the court, in all things, overruled said motion; to which ruling of the court the def't McPhaul, by att'y, in open court, excepts, tenders bill of exceptions, and prays that it be signed &c., &c.

T. H. DUVAL, [SEAL.]
U. S. Judge.

63 *Exception No.* 2.

In the United States circuit court for the western dist. of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184.

Be it remembered that upon the 2d day of February, 1872, the above cause was, upon a regular call of the docket, called for trial; and the plaintiff, by his attorneys, announced ready for trial. And thereupon A. J. Evans, attorney for defendant N. A. McPhaul, called the attention of the court to the motion of said N. A. McPhaul to dismiss the cause from the docket, in words, to wit: (See exceptions No. 1.) And the court having considered said motion of N. A. McPhaul, and overruled the same, the aforesaid A. J. Evans, attorney of record for Mrs. Ann Eliza Tipton, suggested the marriage of his client to Rob't Wright, and her present coverture, and had said suggestion entered by the court; and also suggested the death of Mrs. Ann Delk, formerly Mrs. Ann Flemming, wife of Peter Flemming, deceased, a party defendant in the pleading, and had said suggestion entered of record, and said no more. And thereupon F. H. Sleeper dismissed his suit
64 as to each party named in his petition, except the two named defendants, N. A. McPhaul, in his own proper person, and R. N. Goode, and announced himself ready for trial as to N. A. McPhaul, in his individual right, and R. N. Goode. And the court then called a jury, and inquired of the attorneys for the plaintiff and the attorney for the defendant N. A. McPhaul, if they were satisfied with the jury; to which plaintiff's attorneys responded in the affirmative, and the attorney, A. J. Evans, for N. A. McPhaul, responded he had no objections to make.

Thereupon the plaintiff, by his attorney, proceeded to read to the jury the pleadings in the cause as contained in the transcript of the cause from the court below, and having read a portion of said transcript to the jury stop'ed and prayed that the court would grant him time to procure some law-books; and it being near 3 o'clock p. m., and

was the hour of adjournment, the court granted the time and instructed the jury to return promptly at the hour of 10 o'clock a. m. on the next morning, February 3rd, 1872, and adjourned the court And after the adjournment of the court, as above, and before its re-assembling
65 on 3rd day, one Simon Mussina, attorney in fact of Tomas de la Vega, filed among the papers in the cause his affidavit suggesting the forgery of a certain paper-writing described in said affidavit; which is in words to wit:

In the U. S. dist. court in and for the western district of Texas.

JOHN W. LAPSLEY } vs. N. A. McPHAUL. } No. 1184.

Now comes Simon Mussina, attorney for Tomas de la Vega, and saith that a certain instrument of writing purporting to be a testimonio or second original of a power of attorney purporting to have been executed by Tomas de la Vega, signing as Tomas Vega, to Samuel May Williams, of date May 5th, 1832, a forged instrument of writing, as he doth verily believe.

SIMON MUSSINA.

Sworn to and subscribed before me this Feb. 5th, 1872.

M. HOPKINS, *Clerk.*

Which plaintiff had hereto filed in the cause, but of the filing of which no notice had been given to said Tomas de la Vega, or his attorney; and upon the opening of the court, at the hour to which it had adjourned, the plaintiff, by his attorney, filed exceptions to; and a motion to strike out said aforesaid affidavit is in words to wit:

66 JOHN W. LAPSLEY } vs. N. A. McPHAUL ET AL. }

And now comes the pl'ff and moves the court to strike out & disregard the affidavit of S. Mussina, filed in this case on the 4th inst., al'edging the testimonio of a power to sell from Tomas Vega to Samuel May Williams, of date 5th May, 1832, to be forged.

1. Because the same was made and filed in this case after all parties had announced ready for trial.

2. Because it was made and filed in this case more than one entire day after the filing of said testimonio in court.

3. Because it was made and filed in this case more than one entire day after the principal defendants had been duly notified, under the statute, of the filing of said testimonio in court.

4. Because the said Vega, in whose behalf the said affidavit is pretendedly made, is an intervenor in the case, and cannot be heard to make his affidavit under the circumstances of this case, the said circumstances being of record in this case.

5th. Because all the questions raised by said affidavit are res ad-
67 judicata, as *as* between the said Vega & his privies, which adjudication is of record in this court, in case No. 37, chancery, between Tomas de la Vega, complainant, vs. John W. Lapsley and others, to which reference is here made, and leave asked to refer thereto, and to

all parts thereof, as often as may be necessary for the purposes of this motion.

F. H. SLEEPER,
W. M. WALTON,
For Pl'ff.

Which motion being duly examined and considered, the court made its order striking out said affidavit aforesaid, and sustaining, in all things, the motion of plaintiff, because said affidavit was filed too late in the progress of the trial of the cause; to which ruling of the court the defendant Tomas de la Vega, by his attorney, in open court, excepts, and prays his bill of exceptions be signed, &c., &c., which is accordingly done, with this additional statement, viz, that the court struck out the affidavit and sustained said motion because the design of filing said affidavit was to throw the burden of proof of the execution of said power of attorney upon the plaintiff, and that for this purpose the affidavit had been filed to' late.

T. H. DUVAL, [L. S.]
U. S. Judge.

68 In the United States circuit court for the western district of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
NEILL A. McPHAUL ET AL. } No. 1184.

Be it remembered that on the trial of this cause, the plaintiff produced and offered in evidence to the jury a certain paper-writing purporting to be the testimonio of a power of attorney from "Tomas Vega" and others to Samuel May Williams, to sell the land claimed in plaintiff's petition, of date May 5th, 1832; which power of attorney and certificates are in words, to wit:

Said testimonio and certificates *is* endorsed, to wit:
"Testimonio of the power of attorney executed by José Maria Aguirre, Thomas de la Vega, and Rafael Aguirre, on the 5th day of May, 1832, before Juan Gonzales, regidor and acting alcalde of the city of Leona Vicario. Withdrawn from the general land-office on the 18th day of December, 1854, by Rob. Hughes."

And endorsed, "Filed in my office for record the 7th day of September, at 8 o'clock a. m., A. D. 1856.

R. M. BILLINGSLEY,
Clk Co. Ct. McLennan Co."

And endorsed, "Filed in my office for record the 22d day of Sept., at 8 o'clock, a. m. A. D. 1858.

R. M. BILLINGSLEY,
Clk Co.Ct. McL. Co.

69 Sello segundo { HACIENDA DEL ESTADO } doce reales.
Para el Bienio { LIBRE DE COAHUILA Y TEXAS. } de 1832 y 1833.

En la ciudad de Leona Vicario a los cinco dias del mes de Mayo de mil ochocientos treinta y dos años: ante mí el ciudadano Juan Gonzales,

and the hour of adjournment, the court granted the time and instructed the jury to return promptly at the hour of 10 o'clock a. m. on the next morning, February 5th, 1872, and adjourned the court. And after the adjournment of the court, as above, and before its re-assembling on the 5th day, one Simon Mussina, attorney in fact of Tomas de la Vega, filed among the papers in the cause his affidavit suggesting the forgery of a certain paper writing described in said affidavit; which is in words to wit:

In the U. S. Dist. court in and for the western district of Texas.

JOHN W. LAPSLEY
vs. } No. 1134.
N. A. MCPHAIL. }

Now comes Simon Mussina, attorney for Tomas de la Vega, and saith that a certain instrument of writing purporting to be a testimonio or second original of a power of attorney purporting to have been executed by Tomas de la Vega, signing as Tomas Vega, to Samuel May Williams, of date May 5th, 1832, a forged instrument of writing, as he doth verily believe.

SIMON MUSSINA.

Sworn to and subscribed before me this Feb. 5th, 1872.

M. HOPKINS, *Clerk.*

Which plaintiff had hereto filed in the cause, but of the filing of which no notice had been given to said Tomas de la Vega, or his attorney; and upon the opening of the court, at the hour to which it had adjourned, the plaintiff, by his attorney, filed exceptions to; and a motion to strike out said aforesaid affidavit is in words to wit:

JOHN W. LAPSLEY
vs.
N. A. MCPHAIL, ET AL.

And now comes the pl'ff and moves the court to strike out & disregard the affidavit of S. Mussina, filed in this case on the 4th inst., al'edging the testimonio of a power to sell from Tomas Vega to Samuel May Williams, of date 5th May, 1832, to be forged.

1. Because the same was made and filed in this case after all parties had announced ready for trial.

2. Because it was made and filed in this case more than one entire day after the filing of said testimonio in court.

3. Because it was made and filed in this case more than one entire day after the principal defendants had been duly notified, under the statute, of the filing of said testimonio in court.

4. Because the said Vega, in whose behalf the said affidavit is pretendedly made, is an intervenor in the case, and cannot be heard to make his affidavit under the circumstances of this case, the said circumstances being of record in this case.

5th. Because all the questions raised by said affidavit are res adjudicata, as between the said Vega & his privies, which adjudications is of record in this court, in case No. 37, chancery, between Tomas de la Vega, complainant, vs. John W. Lapsley and others, to which reference is here made, and leave asked to refer thereto, and to

all parts thereof, as often as may be necessary for the purposes of this motion.

F. H. SLEEPER,
W. M. WALTON,
For Pl'ff.

Which motion being duly examined and considered, the court made its order striking out said affidavit aforesaid, and sustaining, in all things, the motion of plaintiff, because said affidavit was filed too late in the progress of the trial of the cause; to which ruling of the court the defendant Tomas de la Vega, by his attorney, in open court, excepts, and prays his bill of exceptions be signed, &c., &c., which is accordingly done, with this additional statement, viz, that the court struck out the affidavit and sustained said motion because the design of filing said affidavit was to throw the burden of proof of the execution of said power of attorney upon the plaintiff, and that for this purpose the affidavit had been filed to' late.

T. H. DUVAL, [L. S.]
U. S. Judge.

68 In the United States circuit court for the western district of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
NEILL A. MCPHAUL ET AL. } No. 1184.

Be it remembered that on the trial of this cause, the plaintiff produced and offered in evidence to the jury a certain paper-writing purporting to be the testimonio of a power of attorney from "Tomas Vega" and others to Samuel May Williams, to sell the land claimed in plaintiff's petition, of date May 5th, 1832; which power of attorney and certificates are in words, to wit:

Said testimonio and certificates *is* endorsed, to wit:
"Testimonio of the power of attorney executed by José Maria Aguirre, Thomas de la Vega, and Rafael Aguirre, on the 5th day of May, 1832, before Juan Gonzales, regidor and acting alcalde of the city of Leona Vicario. Withdrawn from the general land-office on the 18th day of December, 1854, by Rob. Hughes."

And endorsed, "Filed in my office for record the 7th day of September, at 8 o'clock a. m., A. D. 1856.

R. M. BILLINGSLEY,
Clk Co. Ct. McLennan Co."

And endorsed, "Filed in my office for record the 22d day of Sept., at 8 o'clock, a. m. A. D. 1858.

R. M. BILLINGSLEY,
Clk Co.Ct. McL. Co.

69 Sello segundo { HACIENDA DEL ESTADO LIBRE DE COAHUILA Y TEXAS. } doce reales.
Para el Bienio { } de 1832 y 1833.

En la ciudad de Leona Vicario a los cinco dias del mes de Mayo de mil ochocientos treinta y dos años: ante mí el ciudadano Juan Gonzales,

regidor del ylustre ayuntamiento de esta ciudad, y alcalde segundo enturno en ella, y su jurisdiccion por confermidad del proprietario que antuó por receptoria á falta de escribano que no lo hay en el termino de la ley y testigos instrumentales que al fin se nominarán: paresiéron presentes los ciudadanos licenciado José Maria Aguirre, Tomas Vega, y Rafael Aguirre, vecinos de esta ciudad, a quienes doy feé, conosco, y diféron; que en las mas bastante forma que hay lugar en derecho otorgan, que dan y confieren todo su poder, tanto cuanto se requiéron y en derecho sea nesesario á Don Samuel May Williams, vecino de la villa de Austin, especial, para que á nombre de los otorgantes y en representacion de sus propias personas, derechos y acciones tan luego como lo permita la ley de colonizacion de veinte y cuatro de Marzo de ochocientos veinte y sinco, pueda proceder y proceda, segun su voluntad, á la venta de los sitios de tierra que en catorce de Junio de mil ochocientos treinta, los concedió á los otorgantes el supreme govierno de este
70 estado, para cuyo fin podrá el dicho su anoderado otorgar la venta ó ventas de los enunciados sitios en la persona ó personas que le paresca, yo sea al contado ó al fiado, al plazo ó plazos, que le combenga, perciviendo las cantidades de pesos en que contratare los mencionados citios, que para todo cuanto se nesesite, y sea nesesario, le dan y confieren el presente poder sin limitacion ninguna, queriendo como quieren los otorgantes que no por falta de espresion, clausula, requisito ó condicion que aquí no se esprese, deje de obrar este poder, todos los fines á que es conferido; pues todo cuanto de nesesite lo dan por subscritos y aventad como si efectivamente lo estufiera con libre, franca y general administracion y facultad de enjuiciar jurar y que lo pueda substituir, rebocarlos substitutos, y nombrar otros de nuevo que á todos releban en forma, y a haber por firme todo lo que en virtud de este poder se hiciere otorgare y practicare; se obligar los otorgantes con sus personas y bienes presentes y futuros, y con ellos de someten al fuero y jurisdiccion de los señores jueges y justicias, que de sus causa y negocios puedan y deban conoser, para que los compelan y aprernien por todo vigor de derecho y como si fuere por sentencia pasada en autoridad de cosa jusgada, consentida y no apelada; que por tal la
71 reciven: renunciaron su proprio fuero domisilio y vecindad, y todas las leyes que les puedan favoriser con la general en forma. Así lo otorgáron y firmáron, siendo testigos los ciudadanos Antonio Espinosa, Rafael de Leon, y Francisco de la Fuente, y Gonzales, presentes y vecinos de esta ciudad: doy feé.

JUAN GONZALES.
JOSE MARIA AGUIRRE.
TOMAS VEGA.
RAFAEL AGUIRRE.

Sacóse de su original, con cuien concuerda, hoy dia de su otorgamiento: Va en dos fozas utiles del papel del sello segundo, conforme á la ley; se todo lo que, yo, el juez que subscrive autuando con los de mi asistencia segun derecho, doy feé.

JUAN GONZALES.

Ass'e: J. M. C. MORAL.
As'e: JOSE NAZ'O ORTIZ.

(Endorsed:) A.—S. Hewitson. A. referred to by Juan Gonzales in his deposition, taken before me at New Orleans this 29th July, 1857, in the case of John W. Lapsley vs Mitchell & Warren. U. S. circuit court.

J. W. GURLEY,
U. S. Comm'r.

THE UNITED STATES OF AMERICA,
District of Texas, to wit:

I, Archibald M. Hughes, commissioner of affidavit and bail in civil cases in the courts of the United States, appointed by the district
72 court of the district of Texas aforesaid, do hereby certify that this paper is the document marked A, and having the signature thereon of James Hewetson, and which is referred to in the deposition of said James Hewetson this day taken before me in the cases of John W. Lapsley vs. D. R. Mitchell and Warren; John W. Lapsley vs. John Barton; John W. Lapsley vs. William Delk et als.; John W. Lapsley vs. James Barton; John W. Lapsley vs. Charles Duncan; John W. Lapsley vs. David Heffington and William Long; John W. Lapsley vs. David Barton; John W. Lapsley vs. Eliphas Spencer; John W. Lapsley vs. George Barnard; John W. Lapsley vs. James Marlin; John W. Lapsley vs. Brown, eleven in number, now depending in the circuit court of the United States for the eastern district of Louisiana, at New Orleans, by transfer from the United States district court for said district of Texas, at Austin, and which said depositions have been sealed up and transmitted to said court, at New Orleans.

In testimony whereof I hereto set my hand and seal this twenty-third day of February, A. D. 1855.

A. M. HUGHES, *Com'r.* [L. S.]

THE STATE OF TEXAS,
Galveston County, to wit:

73 This day James Hewitson appeared before me, Oscar Farish, clerk of the county court of said county, and made oath, in due form, that he is acquainted with the handwriting of Juan Gonzales, whose signature to the certificate copy of the foregoing power of attorney from José Maria Aguirre, Rafael Aguir'e, and Thomas Vega, purporting to be executed before said Juan Gonzales, regidor of Leona Vicario, and does believe said signature to be the handwriting of said Juan Gonzales. Said witness further made oath that on a former occasion he testified that he believed said Juan Gonzales was dead, which was in consequence of being so informed. He has been since informed, and does now believe, that said Juan Gonzales is living and residing in Saltillo, in the State of Coahuila. And said witness further made oath that he is also acquainted with the handwriting of José Naz'o Ortis and J. M. Moral, who appear to be assisting witnesses to the said copy of said instrument, and that he believes the signatures "José Naz'o Ortis and J. M. Moral" to said copy, in the character of assisting witnesses, are in the handwriting of said assisting witnesses; and he further swears that said Ortiz is dead, and said Moral resides in the said city of Saltillo.

JA'S HEWITSON.

Sworn to & subscribed before me this 17th June, A. D. 1856.

74 In testimony whereof I, the said clerk of the county court, hereto subscribe my n and affix seal of said court the and year aforesaid.

[L. S.]

OSCAR FARISH,
Clk Co. Court of Galvesto .

THE STATE OF TEXAS, *Travis County:*

This day Juan N. Seguin appeared before me, James M. Swisher, clerk of the county court of the county aforesaid, and made oath in due form that he is acquainted with the handwriting of Juan Gonzales, J. M. Moral, and José Naz'o Ortis, whose signatures are to the certified copy of the foregoing power of attorney from José Maria Aguirre, Rafael Aguirre, and Thomas Vega, purporting to be executed before said Juan Gonzales, regidor of Leona Vicario, and does believe said signatures to be the handwriting of Juan Gonzales, J. M. Moral, and José Naz'a Ortis, and does believe that these persons do not reside in the State of Texas, and believes that if they are living they are residents of Saltillo, in the State of Coahuila.

JUAN N. SEGUIN.

Sworn to and subscribed before me this 3d day of September, A. D. 1856, at my office in Austin.

[L. S.] JA'S M. SWISHER,
Clerk C. C. Travis Co.,
By AUG. SCHWARTZ, *Deputy.*

75 THE STATE OF TEXAS, *County of Starr:*

This day personally appeared before me, Peter Dowd, clerk of the county court of said county, in the State of Texas, Juan Gonzales, to me personally known, who being duly sworn according to law, declares and says that the testimonio of the power of attorney made by José Maria Aguerre, Rafael Aguerre, and Tomas Vega to Samuel May Williams on the 5th day of May, A. D. 1832, (which testimonio is marked "A," with the signature S. Hewitson written underneath, and to which this certificate or declaration is attached,) was executed by him at the personal request of the said José Maria Aguerre, Rafael Aguerre, and Tomas Vega, and in their presence and by their direction, and that the signature, "Juan Gonzales," attached to the said testimonio is his true and genuine signature, and was officially signed to the said testimonio as regidor of the corporation of the city
76 of Saltillo and second alcalde in turn, in the aforesaid year A. D. 1832, as is expressed in the said testimonio; and the said declarant further says that the signature', José Naz'o and J. M'a Moral, signed to the said testimonio, were signed as assisting witnesses, in his presence, and are their true and genuine signatures. Declarant further says that the Tomas de la Vega, who extended a certain other power of attorney, before him, to the said Samuel May Williams on the 28th day of April, A. D. 1832, and authorized by him, and the Tomas Vega, who is a party to the testimonio above described, is one and the same person, and declarant knows of no other Tomas Vega or Tomas de la Vega residing in the said city of Saltillo, and has never known of any such person in any other part of Mexico.

JUAN GONZALES.

Sworn to and subscribed before me on this 13th day of July, A. D 1857.

PETER DOWD, *C. C. S. C.*

In testimony whereof I, the said clerk of said county court, hereto subscribe my name and affix the seal of said court this 13th day of July, A. D. 1857.

[L. S.] PETER DOWD,
County Clerk of Starr County, Texas.

77 It is to be understood that the power of attorney mentioned above, of the date of 28th day of April, A. D. 1832, refers to the power of attorney to the said Williams to locate and take possession of the same land mentioned in the testimonio to which this declaration or affidavit is attached.

JUAN GONZALES.

Sworn to and subscribed before me, on this 13th day of July, A. D. 1857.

PETER DOWD, *C. C. S. C.*

In testimony whereof I hereto sign my name and affix the seal of the said county court this 13th day of July, A. D. 1857.

[L. S.] PETER DOWD, *C. C. S. C.*

THE STATE OF TEXAS,
County of McLellan:

I, R. M. Billingsley, clerk of the county court of said county, do hereby certify that the Spanish power of attorney and the certificates to the same was filed in my office, for record, on the 7th day of September, at 8 o'clock a. m., A. D. 1856, and was recorded on the 9th day of September, at 4 o'clock p. m., A. D. 1856, in Book H, in pages 375, (worn,) 377.

In witness whereof I have hereunto set my hand and affixed the seal of the county court of said county at Waco, date last above.

[L. S.] R. M. BILLINGSLEY,
Clerk C. C. McLennan County, Texas.

78 THE STATE OF TEXAS,
McLennan County:

I, R. M. Billingsley, clerk of the county court of McLennan County, Texas, hereby certify that the instrument of writing purporting to be a power of attorney from José Maria Aguirre, Rafael Aguirre, & Tomas Vega to Samuel May Williams, and the certificates and affidavits attached thereto, and to which this is attached, was filed in my office, for record, on the 22d day of September, at 8 o'clock a. m., 1858, and was recorded on the 23d day of September, at 7 o'clock a. m., A. D. 1858, in Book H, on pages 520, 521, 522, and 523.

In witness whereof I have hereunto set my hand and the seal of the county *county* court of McLennan County, in Waco City, this 23d day of September, A. D. 1858.

[L. S.] R. M. BILLINGSLEY,
Clk Co. C't McL. Co.,
By J. C. NEWLON, *Dep'y.*

THE STATE OF TEXAS, *County of Falls:*

I, S. D. Barclay, clerk of the county court of Falls County, do hereby certify that the within instrument of writing was filed in my office, for record, on the 6th day of October, A. D. 1859, at 11 o'clock a. m., & was duly recorded the same day in Book E, pages 418, 419, 420,& 421.

79 Given under my hand and seal of office at Marlin this the sixth day of October, A. D. 1859.

[L. S.] S. D. BARCLAY,
Clk C. C. F. Co.

THE STATE OF TEXAS,
County of Williamson:

I, Levi Pennington, clerk of the county court of the county aforesaid, hereby certify that the annexed and foregoing power of attorney from José Marie Aguirre, Rafael Aguerre, & Tomas Vega to Samuel May Williams, and certificates and affidavits attached thereto, and to which this is attached, was filed in my office for registration on this 15th day of October, at one o'clock p. m., 1859, and was correctly recorded the same day in land-register, vol. 8, on pages 19, 20, 21, 22, & 23.

In testimony whereof I hereto set my hand and affix the impress of the seal of the county court of the county aforesaid, at office in Georgetown, on the day and date last above written.

[L. S.] LEVI PENNINGTON,
Clerk C. C. W. County.

(Endorsed:) "The enclosed deeds filed January 16th, 1872, in Lapsley vs. McPhaul & McPhaul et al., No. 1184 & 1186.
"M. HOPKINS, *Clk.*"

and claimed that it should be admitted in evidence.

80 To the introduction of the aforesaid power of attorney, the defendant, N. A. McPhaul, by his attorney, objected, on the following specific grounds:

First. It is not an original deed, conveyance, or power of attorney, but purports to be a copy, and the presumption of the genuineness of a writing from its age is indulged by the law in favor of the original paper made by the party and not in favor of a copy which he never saw.

Second. The writing is not freed from the suspicion of its genuineness, cast thereon by the fact that it never was recorded under the provisions of the registration-laws of the republic of 1836, which, by implication, allowed its registration, and which laws remained in force three years in Texas, nor was it ever recorded under the law of registration of 1839 in Texas, a law enacted specially for the registration of such a paper, and which remained in force a short time in Texas, but the same was near 30 years before any attempt at registration is shown.

Third. There was no law in force in the State of Texas either in 1852, when first recorded, without any attempted proof, in McLennan
81 County, by J. O. Illingsworth, clerk, or in 1858, by R. M. Billingsley, clerk, upon attached affidavits, or in 1859, when record' in Falls County, where the land does not lie, by Sam. Barnes, that then required or permitted the paper to be recorded; and that the said paper is not any one of the character of instrument set out and provided for in sect's 4, 5, or 6, or any other sect. of "An act to provide for the registry of deeds and other instruments of writing," passed by the legislature of Texas, and took effect July 23rd, 1846, (Hart. Digest Laws of Texas, page 841, 842; Oldham's Digest Laws of Texas, art. 1706, page 377; Paschal's Digest Laws of Texas, art's 3004, 5005, 5006.) The last section of this act repeal' all other registration laws in Texas before that date. (Hart. Digest Laws of Texas, 845, art. 2800, sect. 19.)

Fourth. If the paper offered is such an one as was required or permitted by the laws in force at the time of its registration to be registered, then the same was not proven in the manner required by law. The affidavit of Hewitson, of date , and of Seguin, of date , and of Gon-

sales, of date , all and each are far short of the statute of Texas that admits original papers to record upon secondary testimony. (Hart-
82 ley's Digest Laws of Texas, 842, art. 2793, sect. 9; Paschal's Digest, art's 5008, 5009, pages 838 & 839.)

Fifth. There is no evidence offered at bar to prove the writing, as required at common law.

And each and all of said objections to the admissibility of said writing or power of attorney being duly considered by the court, the same were overruled, and said writing or power of attorney admitted in evidence to the jury.

To which ruling of the court defendant N. A. McPhaul, by his attorney, excepted, and tenders his bill of exceptions and prays it may be signed by the court.

T. H. DUVAL, [SEAL.]
U. S. Judge.

83 *Defendants' 4th bill of exceptions.—Filed Feb.* 8, 1872.

In the United States circuit court for the west. dist. of Texas. January term, 1872.

JOHN W. LAPSLEY *vs.* N. A. McPHAUL ET AL. } No. 1184. Exception No. 4.

Be it remembered that upon the trial of this cause the defendant N. A. McPhaul, by his attorney, introduced in evidence a witness, John T. J. Walker, and offered to show the jury that in the year 1868 he went from Austin, Texas, to the city of Saltillo, Mexico, formerly called Leona Vicario, in the state of Coahuila de Zaurgaza, formerly called Coahuila, and that he carefully examined the book of protocols in the office of the secretary of the ayuntamiento of the said Saltillo, formerly called "Leona Vicario," and that he found in the book of protocols for the years 1832, 1833, an original protocol or matrix of a power of attorney in the Spanish language, of date May 5th, 1832, from José Maria Aguirre to Samuel May Williams, giving said Williams the power to sell the land which the government had granted to Tomas de la Vega and Rafael de Aguirre and José Maria de Aguirre, to wit, eleven leagues each; that said protocol or original has not to it *it* the
84 signature or pretense of the signature of any one or person except José Maria de Aguirre and Juan Gonzales; the name of neither Rafael de Aguirre or Tomas de la Vega, nor any witnesses, is found on said portocol or original he examined; that in said protocol book aforesaid, and of date April 28th, 1832, he found an original protocol of a power of attorney, signed by José Maria de Aguirre or Aguirre, and Tomas de la Vega and Juan Gonzales, and with assisting witness' Ortes & Moral; this power is to Samuel M. Williams; and that in said book of protocols, from the power of attorney of the 27th of April, 1832, to the power of the 5th day of May, 1832, inclusive, there were seven leaves and no visable evidence of any mutilation of the book; that there are no protocols of any power of attorney from either Maria de Aguirre or Aguirre, or Tomas de la Vega to any one in said seven leaves, except the two named above; that he has in his hands now in court, photographic copies of the said seven leaves of the said book show exactly what he states.

To the admissibility of the said above facts, in evidence to the jury,

the plaintiff, by attorney, excepted, and the court sustained
85 the exceptions, and refused to admit said facts in evidence to the jury; to which ruling of the court the defendant N. A. McPhaul, in open court, excepts, and tenders bill of exceptions, and prays it may be signed by the court.

T. H. DUVAL, [SEAL.]
U. S. Judge.

86 *Defendants' 5th bill of exceptions.—Filed Feb.* 8, 1872.

In the United States circuit court for the western dist. of Texas. January term, 1872.

JOHN W. LAPSLEY *vs.* N. A. McPHAUL ET AL. } No. 1184. Exception numbered 5.

Be it remembered that on this day this cause being called for trial, A. J. Evans, attorney of record for N. A. McPhaul, in his individual capacity, moved the court to appoint and bond a special guardian to represent in this cause the interests and rights of the minor heirs of Sarah A. McPhaul, deceased, to wit, John, a minor, 9 years old; Henry, a minor, 7 years old; Alice, a minor, 5 years old, the pleadings showing a claim of title in them in right of their mother, as provided by the laws of the State of Texas in such cases; which motion the court overruled: To which ruling of the court, the defendant N. A. McPhaul excepts, tenders his bill of exceptions, and prays the same may be signed, &c., &c.

And thereupon the said A. J. Evans made his additional motion that the court should compel the plaintiff to enter of record a dismissal of
87 the said aforesaid heirs of Sarah A. McPhaul, deceased; which motion, being considered by the court, was overruled, because the plaintiff had not sued them and was claiming no judgment against them: To which ruling of the court the defendant N. A. McPhaul excepts, tenders his bill of exceptions, and prays the same may be signed, &c., &c

T. H. DUVAL, [SEAL.]
U. S. Judge.

There appears also among the papers of the cause the following paper-writing, endorsed: "No. 1184. John W. Lapsley vs. N. A. McPhaul et al. Exceptions No. 5;" & endorsed, "Filed February 7th, 1872. M. Hopkins, clerk."

And which is in words, to wit:

88 *Exception numbered* 5.

(Endorsed:) Filed Feb. 7, 1872.

JOHN W. LAPSLEY *vs.* N. A. McPHAUL ET AL. } No. 1184. Exception No. 5.

Be it remembered that upon the trial of this cause the plaintiffs having read in evidence to the jury the testimonio purporting to be the testimonio of a power of attorney from "Tomas Vega," and others, to

Samuel M. Williams, of date May 5th, 1832, as a paper properly authenticated and recorded in McLennan County, Texas, and duly filed and notice given of filing in this cause; (*here insert and make a part hereof the said instrument aforesaid, with each and all the papers and certificates attached thereto, both of proof and record;) and upon such evidence the defendant N. A. McPhaul moves the court to charge the jury as follows:

1. In your deliberation in this cause you must disregard the paper which purports to be the testimonio of a power of attorney from Tomas Vega to Samuel M. Williams, of date May 5th, 1832; and to charge that,

2. Unless you believe from the evidence before you that the original grantee of the land sued for and the person making the instrument,
89 if it was ever made, purporting to be a power of attorney from Tomas Vega to Samuel M. Williams, are one and the same person, then you must disregard the said instrument.

3. Unless you believe from the testimony before you that the original grantee of the land sued for and the person making the instrument, if ever made, purporting to be a power of attorney from Thomas Vega to Samuel M. Williams, are one and the same person, you must find for defendant.

The first of the within instructions asked for is refused.

The second and third are given, with this qualification, viz, that if the jury believe from the evidence, documentary or oral, that the original grantee of the land was known indifferently by the name of Tomas Vega and Tomas de la Vega, then the presumption is that he is the same person who signed the power of attorney to Sam'l M. Williams, and you will so consider, unless satisfied such is not the fact from other evidence.

T. H. DUVAL,
U. S. Judge.

90 *Exception No. 6.—Filed Feb. 8, 1872.*

In the United States circuit court for the western district of Texas.
January term, A. D. 1872.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184. Exception No. 6.

Be it remembered that, on the trial of this cause, it appeared in evidence, by a witness, E. J. Gurley, that the defendant N. A. McPhaul is in possession of a league of land known as the Peter Flemming league, which is in conflict with the eleven league' set out in plaintiff's petition; that N. A. McPhaul was a married man in the year 1857 or 1858, and about that time, with his family, settled upon and made his home upon said Fleming league, and from thence until now has lived upon said league (Flemming) as his homestead; that McPhaul's wife was the daughter of Peter Flemming, the original grantee of said league of land; that said Peter Flemming died long since; that the Flemming league is a colony-league grant, made by the government in
1835; that McPhaul's wife is dead—died a few years since and
91 left minor children; that McPhaul claims possession of the

*See exceptions No. 3 for testimonio & certificates.

league in the right of his wife, and as his homestead, but claims no title in himself; that his minor children now live with him on the league aforesaid, and that upon such testimony the defendant moves the court to charge the jury as follows:

If you believe from the testimony that the defendant N. A. McPhaul is in the possession of a league of land granted to Peter Flemming by the government, and that said league is in conflict with the land claimed in plaintiff's petition, that Peter Fleming is dead, and that McPhaul intermarried with a daughter of Peter Flemming, and that he, as the husband and head of the family, took possession of the league of land, in the right of his wife, who inherited it from her father, and that his wife is dead, and that she left children, and that those children are minors and live in the family of their father on the league, then you must find for the defendant McPhaul because these are not proper parties in this suit.

Refused. T. H. DUVAL.

To which ruling def't excepts & tenders bill of exceptions, &c., &c.

T. H. DUVAL, [SEAL.]
U. S. Judge.

92 *Exception No. 7.—Filed Feb.* 8, 1872.

In the United States circuit court for the west. dist. of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184. Exception No. 7.

Be it remembered that on this day, this cause being called for trial, A. J. Evans, attorney of record for N. A. McPhaul, in his individual capacity, moved the court for a scire facias to issue to make Robert Wright a party, the marriage of Mrs. Ann E. Tipton with said Robert Wright, having been, on a previous day of this term, suggested and entered on record, and the pleading in this cause showing a claim of title in her; which motion, upon consideration, the court overruled, because the suit had already been dismissed by pl'ff as to the def't Tipton & wife.

To which ruling of the court defendant N. A. McPhaul excepts, tenders his bill of exceptions, and prays the same may be signed, &c., &c.; which is done, with the statement that the court overruled the motion because the plaintiff had previously dismissed his suit as to Ann E. Tipton and her husband death had been suggested.

T. H. DUVAL, [SEAL.]
U. S. Judge.

93 (Endorsed:) "No. 1184. John W. Lapsley v. N. A. McPhaul et al. Exception 8. Filed Feb. 8, 1872. M. Hopkins, cl'k."

Exception 8.

In the United States circuit court for the west. district of Texas. January term, A. D. 1872.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184.

Defendants moves the court to charge the jury that the decree of the

district court of Falls County, Texas, precludes the plaintiff, Lapsley, from recovering of the defendant in this case the 800 acres of land described in said decree and decreed to Sarah A. McPhaul, wife of the defendant, in her life-time.

This charge is prayed upon the certified copy of the decree rendered in said charge, which is here referred to and attached hereto and made a part hereof entire, and which the court refused to admit in evidence to the jury, on the grounds that the same is not authenticated as required by law; because the best evidence of the existence of such a decree as that offered is a copy of the original judgment, under the certificate and seal of the clerk of the court wherein said decree was rendered; and because there was no pleading by the defendant under which the decree could be offered in evidence, the decree sought to be offered in evidence having been rendered after the suit had commenced.

T. H. DUVAL, [SEAL.]
U. S. Judge.

94 Be it remembered that, on trial of this cause, the defendant moves the court to charge the jury as follows:

That the decree of the district court of Falls County, Texas, precludes the pl'ff, John W. Lapsley, from recovering in this action the 800 acres of land described in said decree, and in said decree decreed to Sarah A. McPhaul, wife of defendant, in her life-time, & to Mrs. Ann Eliza Tipton.

95 *Exception* 9.

In the United States circuit court for the west. dist. of Texas. January term, 1872.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } No. 1184. Exception No. 9.

Be it remembered that on this day the above cause, being called for trial, the defendant N. A. McPhaul, by his attorney, A. J. Evans, moved the court for a scire facias to make the heirs of Ann Delk, formerly Ann Flemming, wife of Peter Flemming, deceased, whose death at a former day of this term of the court was suggested and entered of record, to the end that proper parties might be made to this suit; which motion being considered by the court, the same was overruled, the pleading in the case showing claim of title in her: to which ruling the defendant N. A. McPhaul excepts, tenders his bill of exceptions, and prays the same may be signed, &c., &c., with the statement that the court overruled said motion, because Ann Delk had made herself a party to the suit below as an intervenor, and plaintiff claimed nothing against her heirs, & should not be delayed of his cause of action for the purpose of enabling parties to be brought into court against whom plaintiff was claiming nothing.

T. H. DUVAL, [SEAL.]
U. S. Judge.

96 *Exception No.* 10.—*Filed Feb.* 8, 1872.

In the United States circuit court for the western district of Texas.
January term, 1872.

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } No. 1184.

Be it remembered that on the trial of this cause the court charged the jury, on its motion, as follows: That the documentary evidence read them in evidence by plaintiff, to wit, the original grant from the government to Tomas de la Vega, of date 1833, to wit, (Translated copy of which is endorsed, "Translated copy of a title for eleven leagues of land to Tomas de la Vega, by att'y:") & endorsed, "Filed Feb. 3, 1872. M. Hopkins, clerk:" and is in words, to wit:

Third seal, two reales, established by the state of Coahuila and Texas, for the years, '28, '29, '30, & '31, '32, & 33.—WILLIAMS.

To the alcalde of the town of Austin:

The citizen SAMUEL M. WILLIAMS, in best legal form and under legal and necessary protest, appears before you and says:

That I possess power of attorney of the citizens lawyer José Maria Aguirre, Rafael Aguirre, and Tomas Vega, inhabitants of the town of Leona Vicario, authorizing me to petition and request for the possession of eleven leagues of lands in favor of each one of my con-
97 stituents, who obtained a right in conformity with article 24 of the colonization law of the state of the 24th of March, 1825, by the sale granted by the supreme government of the state, dated 14 June, 1830, as is verified by the authorized copy of the original document issued by the secretary of the same supreme government, and the original of which was attached to the issue made in favor of citizen Rafael Aguirre, and I hereby accompany to you the said copy for the corresponding purpose, and, as it is convenient to my constituents to take their lands in distinct places, I pray in their names, by virtue of justice, to be pleased to order that the title of personal possession be given to me for eleven leagues of land on the left margin of the Brazos River, at the point where the Indian village of the Tehuacana Indians exists, and opposite of the Hiecos and within the colony of the empressarios Austin and Williams, provided they give their approval, and also under the conception that the supreme government has empowered you to give the possession by the superior order dated 2d May, 1832, which is annexed to the issue made in favor of citizen José Maria de Aguirre, praying to be pleased to order such procedure as may
98 be conducive to the interest of my constituent, with the understanding that I offer to cultivate it conformably to the provisions of the law, and to comply with the other obligations of the same. Therefore, I supplicate to be pleased to attend to this petition in which I shall receive grace and justice. (Rafael Aguirre erased and Tomas Vega interlined.)

Town of Austin, 3d October, 1833.

SAMUEL M. WILLIAMS.

TOWN OF SAN FELIPÉ DE AUSTIN, *the 3d October*, 1833.

Presented and admitted as prayed for. Apply to the impressarios Austin & Williams that they expose their opinion about this petition,

and, in case of their approval, apply to the scientific and principal surveyor, Francis W. Johnson, to make the surveys of the eleven leagues denounced by the attorney of Tomas de la Vega, that in view thereof and of the qualifications which he has to make according to law, the corresponding title may issue. The document referred to to be attached. Thus I order and sign.

LESASSIER.

TOWN OF SAN FELIPÉ DE AUSTIN, *the* 4 *October*, 1833.

In the exercise of the faculty conceded to me by the laws and in conformity to article 9 of the contract which we hold, entered into with the supreme government of the state, the denunciation made by the
99 attorney of Tomas de la Vega of eleven leagues of land on the left margin of the Brazos River is approved, which leagues are entirely vacant.

SAMUEL M. WILLIAMS,
For Himself, and as Attorney of his Partner.

To the alcalde and commissioner:

The tract which I have surveyed by virtue of your foregoing decree for the attorney of Tomas Vega is situated on the left margin of this river, Brazos, at the place where there is an old village of the Tehuacana Indians, and in front of the village of the Uecos Indians and adjoining in its lower part to the tract of three leagues surveyed for citizen José Antonio Tauchaca, and it has the lines, limits, and boundaries and corners as follows, to wit:

Beginning the survey at the upper corner of said tract at a stake on the said margin of the river, from which a box-elder 8 in. dia. bears N. 75° west, $12\frac{6}{10}$ varas; another box-elder 6in. dia. bears N. 58° west, $11\frac{8}{10}$ varas; thence a line was run north 62° east, and at 360 varas crossing the creek called Tahuacana, and at 17,093 varas a stake was put on the upper boundary of the said tract; thence from this point another line
100 was run north 28° west 14,180 varas, where a stake was put in the prairie; thence from this point a line was run south 62° west 22,953 varas to a stake on the river for the lower corner in front of the mouth of the Bosque River, from which a cottonwood, 6 in. dia., bears S. 9° east, 2 varas, and another cottonwood, 18 in. dia., bears north $5\frac{1}{2}$° east, 9 varas; thence from this point following the river downward with its twists to the place of beginning, and containing a plane area of eleven leagues of land, or, what is the same, of 275,000,000 square varas, bounded by the river, and on its lower part by the said tract of , and on the other sides by vacant lands. The timber on the river consists of oak-trees, elm, ash, cottonwood, and hackberry, and in the prairie are mosquite, and it is composed, according to my faithful knowledge and understanding, of two leagues of land of the arable class and of nine leagues of grazing-lands, and its configuration is as shown by the plan which hereby follows in duplicate.

F. W. JOHNSON.

Third seal. Two reales. [SEAL.] For the years 1830 & 1831.

To his excellency the governor:

101 The citizen lawyer José Maria de Aguirre, Rafael de Aguirre, and Thomas de la Vega, with due respect, expose: As the colonization law, in manner and form as provided in its 24 articles, allows us to acquire by sale vacant tracts of the state, your excellency may be pleased to con-

cede a sale to each one of the petitioners of eleven leagues of grazing-land on the San Antonio River, or in any other vacant place which may be more convenient; good, if all the leagues which we pretend to buy are all in one body; good, if they are composed of different sections, according to our will and selection, for which we oblige ourselves to pay its price at the terms designated by law, and to comply with all the other obligations which apply to us as purchasers. We supplicate your excellency to be so good as to accede to this our petition, in which we shall receive grace and favor.

JOSÉ MARIA DE AGUIRRE.
THOMAS DE LA VEGA.

LEONA VICARIO, 14*th June*, 1830.

In conformity with the 24th article of the colonization law of the 24th March, 1825, I grant a sale to each one of the petitioners of the eleven leagues for which they pray, from the vacant lands of the
102 state at the place which they designate, or in such as suits them best, after the commissioner of the supreme general government has designated the sufficiency for the payment of what the state owes to the federation. The constitutional alcalde of the municipality to which the said tracts may belong will put them in possession of said leagues and issue the corresponding title, previously qualifying the class and quality of the same, in order to determine what must be paid to the state, for which payment I grant them the terms designated in article 22 of the said law.

The secretary give, to the parties interested copy of their petition and of this decree, that with them they may apply to the commissioner to have the desired effect for further proceedings. It is copy of its original which exists in the archives of the secretariate under my charge, to which I refer, from whence it was ordered to be taken by disposition of his excellency the governor.

Leona Vicario, 13th of June, 1830.

SANTIAGO DEL VALLE, *Sec't.*

Third seal. } [SEAL.] { For the year
Two reales. } { 1832 and 1833.

To his excellency:

103 The citizen José Maria de Aguirre, for himself, and in the name of those the same class, Tomas Vega and Rafael Aguirre, with the highest respect before you, say that in the year 1830 he has petitioned this government that there may be granted in class of a sale the leagues of vacant lands in this state which can be granted in sale to Mexicans, and this petition had no impediment, and the same government deigned to accede to it, and agreed, on the 14th of June of the said year of '30, that as soon as the federation should have taken the land which is, than pretended to buy of the state, the possession of the leagues conceded to us should be given to us by the alcalde or alcaldes in whose jurisdiction they might exist. It now appears to be in time to proceed without obstacle to receive the tracts for which we have contracted in class of sale, and as it may happen that the same belong to one of the enterprises of colonization, for which there must be appointed a commission of surveys for the corresponding partition of lands, I hereby petition your excellency to be pleased to resolve that not only the alcaldes before whom we may present ourselves may proceed to

give us possession of the leagues which we have selected, but
104 also, if necessary, that the commissioners of surveys can do so, in order to avoid inconveniences which may obstruct the possession for which we pray. Therefore, I pray your excellency to be pleased to order conformably, in which I shall receive justice.

Leona Vicario, May 2, 1832.

JOSÉ MARIA DE AGUIRRE.

LEONA VICARIO, *2nd of May*, 1832.

I have seen the foregoing petition, and, in conformity with the orders of this government of the past year to the chief of the department of Bexar, on the 23 June, 1830, I proceed to appoint, in order to give possession of the tracts designated in this petition, the commissioner for the partition of lands in the enterprise to which the leagues belong, which are conceded to petitioner and his partners and, in case they do not belong to any enterprise, the first or only alcalde of the respective municipality, or the nearest, that he, in conformity with the instructions and orders existing in this matter, proceed to give the designated possession. The secretary give' to the interested copy of this petition and of this order, to have the desired effect for further proceedings, the
105 document of the concession to be annexed to the original.

LETONA.

SANTIAGO DEL VALLE, *Secret'y.*

It is copy of the original which exists in the archives of the secretariate under my charge, from whence it was ordered to be taken by disposition of his excellency the governor.

Leona Vicario, 2nd of May, 1832.

SANTIAGO DEL VALLE, *Sec't'y.*

The town of San Felipe de Austin, at the fourth day of the mouth of October, thousand eight hundred and thirty-three.

I, the citizen Luke Lesassier, constitutional alcade of this town and its municipality, in the exercise of the faculties conferred on me by the supreme government of this state, by decree dated at Leona Vicario, the second May of the year 1832, as per certified copy placed on page of this issue, and in attention to the sale granted by the said supreme government in favor of the citizens José Maria de Aguirre, Rafael de Aguirre, and Tomas de la Vega, to each one, of eleven leagues of land, as shown by the superior decree of sale, dated in said Leona Vicario, the 14th June, of the year thousand eight hundred thirty, issued by the secretary of the same government, which, in an authorized copy,
106 has been presented to me by his attorney in fact, Samuel M. Williams, placed on page of this issue, the original being with the proceedings made in favor of José Maria de Aguirre, and in attention to the superior order contained in said decree of the 2 May of the past year, and that of the excellent sir the vice-governor, dated the 29th of the month of January of the present year, circulated by the chief of this department on the 19th of past February, declaring to be without effect the provisions dictated by the supreme government of the state, about that the citizens to whom tracts have been granted could not take possession of the same until the assignation, which should have been made by the general commissioner of the nation, had been verified, and as the eleven leagues denounced by the party interested do not belong to any of the places conferred to the federation by said order, and in view of the approval given by the empressarios Aus-

tin and Williams, placed on the reverse on the first leaf of this issue, as the tracts belong to the enterprise of said empressarios.

107 In conformity with the colonization law of the state of the 24th March, 1825, and in the name of the state, I confer and put the said attorney of Tomas de la Vega in real, actual, corporal, and virtual possession of eleven leagues of land, the same for which he prays and which were sold to him by the government, on the Brazos River, whose situation, boundaries, limits, and corners are described in the field-note made by the scientific and practical surveyor, citizen Francis W. Johnson, on the second leaf and the reverse thereof of this issue, with the configuration as shown by the annexed map. The said tract appears by said field-note to the surveyor to be one and a half leagues as belonging to arable class, and nine and a half leagues of grazing-lands.

I, the said alcalde and commissioner, in the exercise of the faculties given to me by law, do declare and classify the same, in conformity to which he must pay to the state the sum of one thousand one hundred seventy-five dollars, as ordered in the 24th article of the said colonization law, dated 24th of March, thousand eight hundred and twenty-five, and at the terms designated by article 22 of the same law, under

108 the penalties therein established; he being notified that within one year he must construct permanent land-marks at each angle of the tract; that he must cultivate it in conformity with the determinations of the said law, and that he has conscientiously to comply with everything ordained in this and other laws. Therefore in the exercise of the faculties conceded to me by the said decree of the supreme government of the state, and by other dispositions of the same government in this matter, by the law and subsequent instructions by which I am governed, I issue the present title and order that a testimonio of it be taken & be delivered to the party interested, that he possess, use, and enjoy the tract which has been sold to him—he, his children, heirs, and successors, or whoever of him or them cause may have, action or right may present. Thus to be is the will of the state.

Given in the said town of San Felipe de Austin, dated as above, which I sign with witnesses as assistants according to law.

L. LESASSIER.

Assisting: HORATIO CHRIESMAN.
Assisting: ROBERT PEEBLES.

GENERAL LAND-OFFICE,
Austin, 16 *January*, 1872.

I, Theo. Goldbeck, translator in said office, bonded and sworn,

109 hereby certify that the foregoing, on 12 pages, is a correct translated copy of a title in the Spanish language for eleven leagues of land to Tomas de la Vega, on file in this office.

THEO. GOLDBECK,
Translator.

THE STATE OF TEXAS,
General Land-Office:

I, Jacob Kuechler, commissioner of the general land-office of the State of Texas, hereby certify that Theo. Goldbeck is translator in the said office; that he is bonded and sworn, and that his acts as such are entitled to full faith & credit.

In testimony whereof I hereunto set my hand, and cause the seal of

said office to be affixed, at Austin, this the 16th of January, A. D. 1872.

[L. S.] JACOB KUECHLER,
Comm'r Gen'l Land-Office.

And the testimonio of a power of attorney from Tomas Vega to Samuel M. Williams, of date 1832, (see 3d exception for testimonio and certificates,) and other deeds, the validity of which defendant did not question, formed a claim of title from the government to plaintiff.

110 And further, the court orally and in writing charged the jury that the admission in evidence to them of the testimonio of May 5, 1832, is prima-facia evidence of its genuineness.

And further, in substance and at the request of plaintiff, that *either* was before them no evidence that the testimonio is not genuine, except the evidence of difference of name.

To which charges defendant excepted on the ground that the charge took from the jury the question of the identity of the grantee of the 11 leagues of land and the maker of the testimonio.

And on the further ground that the admission of the testimonio in evidence to the jury is no evidence of its genuineness.

And further excepts, on the grounds that the above charge by the court at the request of plaintiff is a charge upon the weight of testimony and excluded the intrinsic evidence of its want of genuineness, which the paper showed from its want of record in the proper courts for 20 years from its date.

T. H. DUVAL, [SEAL.]
U. S. Judge.

111 *Exception No.* 11.—*Filed Feb.* 8, 1872.

Exception No. 11 is in words, to wit:

In the United States circuit court for the west. dist. of Texas. January term, A. D. 1872.

JOHN W. LAPSLEY *vs.* N. A. MCPHAUL ET AL. } No. 1184.

And the jury having come into court, and in a writing or note,* and the court then charged them as follows, (orally:) That the testimonio, the original and copy of which is before you, of May 5th, 1832, is evidence before you for your consideration, and it is not necessary that the signature of the grantee, Tomas de la Vega, in his own proper handwriting should be on the testimonio before you, and that if Tomas de la Vega did sign the original of the testimonio and the *testimonio* before you, , in the office at Saltillo, then the testimonio given you in evidence with proof of a conveyance made by Williams, the attorney, by virtue thereof, would divest la Vega of his lands, to wit, the eleven (11) leagues, set out in plaintiff's petition.

112 To said charge of the court the defendant excepts, because the jury already had full instructions from the court on the points in

*A mere memorandum of interrogation not returned to the clerk or filed, and not among the papers.—CLERK.

the cause; because said charge called the mind of the jury from the consideration of the want of genuineness of the testimonio, arrising from a failure of plaintiffs to show the existence of or the genuineness of any protocol in Saltillo, and the want of its record for 20 years; all of which exceptions being considered were overruled, and defendant excepts and tenders bill of exceptions, &c., &c.

T. H. DUVAL, [SEAL.]
U. S. Judge.

113 *Petition for writ of error.*

Endorsed in words, to wit, "1184. John W. Lapsley vs. N. A. McPhaul. Petition for writ of error. Filed Feb'y 29, 1872. M. Hopkins, cl'k:" and in words, to wit:

UNITED STATES OF AMERICA,
Western District of Texas:

JOHN W. LAPSLEY
vs.
N. A. MCPHAUL ET AL. } Law. No. 1184.

To the honorable the circuit court of the United States for the western district of Texas, sitting at Austin:

The petition of N. A. McPhaul respectfully represents that at a term of the United States circuit court for the western district of Texas, begun and holden on the first Monday of Jan'y, in the year of our Lord one thousand eight hundred and seventy-two, at Austin, your honors presiding as judges, and holding said court on the 3rd day of Feb'y, A. D. 1872, in a certain cause wherein John W. Lapsley was plaintiff, and N. A. McPhaul, defendant, a final judgment was rendered in said court, the highest court in which a decision could be had; that
114 the value of the property in said suit was more than two thousand dollars, exclusive of all costs; that said judgment was final; that the decision of said court was adverse to the right, title, and interest of the defendant, your petitioner, and that it so appears of record.

Now, petitioner prays that a writ of error may be granted to him and that he may have the proceedings and record of said cause carried to the Supreme Court, and the numerous errors which are there contained revised and corrected, and the erroneous judgment against him in said cause reversed. And further prays that the said John W. Lapsley and his att'ys of record, Norris & Sleeper, F. H. Sleeper, & W. M. Walton, be cited to be and appear at the next regular term of the Supreme Court of the United States, to be held at the city of Washington, in the Dist. of Columbia, on the first Monday of December next, A. D. 1872, to show cause, if any he can, why the errors apparent in the above-entitled and numbered cause should not be revised and corrected and the judgment therein be reversed. And petitioner files herewith and tenders bond for costs in the sum of five hundred dollars, duly executed to the said plaintiff, the said John W. Lapsley. And petitioner prays for all such other and further orders as may be necessary, &c.

115 N. A. MCPHAUL,
By his att'ys, EVANS & ALEXANDER.

M'CH 15, 1872.

Writ of error allowed.

T. H. DUVAL,
U. S. Judge.

Also bond for writ of error, filed Feb'ry 29th, 1872, in words, to wit:

In the United States circuit court, western district of Texas.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. } No. 1184.

Know all men by these presents that we, N. A. McPhaul, as principal, and Simon Mussina and George W. Patten, as sureties, are held and firmly bound unto John W. Lapsley in the full and just sum of five hundred ($500) dollars, to be paid to the said John W. Lapsley, his certain att'y, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the 25th day of February, in the year of our Lord one thousand eight hundred and seventy-two: Conditioned always as follows:

Whereas, lately, at a circuit court of the United States, fifth ju-
116 dicial circuit, holding session in and for the western district of Texas, at the city of Austin, in a suit depending in said circuit court wherein John W. Lapsley is plaintiff and N. A. McPhaul is defendant, No. 1184 on the docket of said court, judgment was rendered against the said N. A. McPhaul, and the said N. A. McPhaul having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John W. Lapsley, citing and admonishing him to be and appear at a Supreme Court of the U. States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said N. A. McPhaul shall well and truly pay all such costs as upon the affirmance of the aforesaid judgment or decree may be adjudged or decreed to the respondent in error, then the above obligation to be void; else to remain in full force and effect.

N. A. McPHAUL. [SEAL.]
SIMON MUSSINA. [SEAL.]
GEO. W. PATTEN. [SEAL.]

The above bond is app'd.

T. H. DUVAL,
U. S. Judge.

117 *Citation in error.*

(Endorsed in words, to wit:) Citation in error. Filed Feb'y 29, '72. M. Hopkins, cl'k.

JOHN W. LAPSLEY
vs.
N. A. McPHAUL ET AL. }

And in words, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to John W. Lapsley, or Norris & Sleeper, F. H. Sleeper, and W. M. Walton, the attorneys of record of said John W. Lapsley, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States of America to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the western district of Texas, at Austin, wherein N. A. McPhaul is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said N. A. McPhaul should not be reversed and speedy justice done to the party in this behalf.

Witness the honorable Salmon P. Chase, Chief Justice of said
118 Supreme Court, at the city of Austin, this 29th day of February, 1872.

[L. S.]

T. H. DUVAL,
U. S. Judge.

Test, with seal of court:

M. HOPKINS,
Circuit Court Clk.

United States circuit court, Austin, Texas.

Personally appeared before me, the undersigned authority, Frank W. Hopkins, who, being duly sworn, doth depose and say that he delivered a true copy of this writ to W. M. Walton, esq., att'y of record (in case No. 1184) for plaintiff, said case entitled John W. Lapsley vs. N. A. McPhaul et als., showing to said att'y the original writ of citation in error, this 28th day of August, A. D. 1872.

FRANK W. HOPKINS.

Sworn and subscribed before me the day and date above written.

M. HOPKINS, *Clerk.*

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States, 5th circuit, in and for the western of Texas, at Austin sitting, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of appeal, which is in the said circuit court, before you, between John W. Lapsley and N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. W. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nath'l White, and Edw'd Smith, a manifest error hath happened, to the great damage of the said N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. W. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nath'l White, and Edw'd Smith, as by their complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
120 Court of the United States, together with this, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the hon. Salmon P. Chase, Chief Justice of the said Supreme Court, the 29th day of Feb'y, in the year of our Lord one thousand eight hundred and seventy-two.

[L. S.] MATTHEW HOPKINS,
Clk of the Circuit Court of the U. States in and for the West. Dist. of Texas, at Austin.

121 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin sitting, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between John W. Lapsley and N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. W. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nat'l White, & Edw'd Smith, a manifest error hath happened, to the great damage of the said N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. W. Goode, Margaret Parsons, Mrs. S. H. Johnson, Mark Byrd, M. W. Luckey, Nath'l White, & Edw'd Smith, as by their complaint appears:

We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right
122 and according to the laws and customs of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court, the 29 day of February, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] MATTHEW HOPKINS,
Clerk of the Circuit Court of the U. States in and for the Western District of Texas, at Austin.

123 I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing one hundred and twenty pages, inclusive, contain a full and true transcript of the record of all the proceedings had in case No. 1184 on the docket of this court, wherein John W. Lapsley was plaintiff and N. A. McPhaul and others were defendants, as they appear of file & record.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Austin, this 28th day of August, A. D. 1872.

[SEAL.] M. HOPKINS, *Clerk.*

124 M'PHAUL ET AL. *vs.* LAPSLEY.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to John W. Lapsley, or Norris & Sleeper, F. H. Sleeper, & W. M. Walton, the attorneys of record of said John W. Lapsley, greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States of America, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America for the western district of Texas, at Austin, wherein N. A. McPhaul is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said N. A. McPhaul should not be reversed, and speedy justice done to the party in this behalf.

Witness the honorable Salmon P. Chase, Chief Justice of said Supreme Court, at the city of Austin, this 29th day of February, 1872.

[SEAL.] T. H. DUVAL,
U. S. Judge.

Test, with seal of court:

M. HOPKINS,
Circuit Court Clerk.

United States circuit court, Austin, Texas.

Personally appeared before me, the undersigned authority, Frank Hopkins, who, being duly sworn, doth depose and say that he delivered a true copy of this writ to W. M. Walton, esq., attorney of record (in case No. 1184) for plaintiff, said case entitled John W. Lapsley vs. N. A. McPhaul et als., showing to said attorney the original writ of citation in error, this 28th day of August, A. D. 1872.

FRANK W. HOPKINS.

Sworn and subscribed before me the day and date above written.

M. HOPKINS, *Clerk.*

(Endorsed:) 1184. John W. Lapsley vs. N. A. McPhaul et als. Citation in error. Filed Feb. 29, 1872.

M. HOPKINS, *Clerk.*

In the circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin.

JOHN W. LAPSLEY *vs.* N. A. MCPHAUL ET ALS. L. 1148.

The answer of Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, to the writ of certiorari directed to the judges of said court, in the foregoing cause, No. 520, in the Supreme Court of the United States.

Answering, says that the record in the above cause was not transmitted, sealed up, or enveloped or directed by him, the clerk, to the clerk of the Supreme Court of the United States, but by the solicitor of McPhaul, the appellant, who took from his hand the papers in
125 the case as well as the record; that the responsibility of seeing that it is in all things complete, as to the writ of error and citation, rests upon the party so illegitamately removing it.

That the papers in the cause were mislaid in the office of the attorneys of Lapsley, who receipted for the same Oct. 21, 1872, after their return to the clerk's office by W'm Alexander, att'y for the appellant McPhaul; that not until this day, on the personal search of the clerk, could the papers be found or the clerk make his return. All of which is respectfully submitted.

[SEAL.] M. HOPKINS, *Clk.*

AUSTIN, *March* 6, 1873.

THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the western district of Texas, greeting:

Whereas in a certain suit in said circuit court between John W. Lapsley, plaintiff, and N. A. McPhaul et al., defendants, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That it appears by the affidavit of Frank W. Hopkins, on page one hundred and eighteen of the manuscript transcript of the record from the court below, that the defendant in error, John W. Lapsley, was duly served with citation in error in this cause, signed by one of the judges of the circuit court of the western district of Texas, but that the original citation has not been sent up with the record."

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions and errors you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, A. D. 1872.

D. W. MIDDLETON,
Clerk Sup. C't U. S.

Issued December 27, 1872.

(Endorsed:) Sup. Court U. S. Dec. term, 1872. No. 520. Lapsley vs. McPhaul. Certiorari. Filed Jan'y 10, 1873. M. Hopkins, clerk. Certiorari & return. Filed 14th March, 1873. D. W. M., clerk.

(Indorsement on cover:) No. 301. N. A. McPhaul, Sarah McPhaul, Isham Tipton, Ann E. Tipton, R. W. Goode, Margaret Parsons, S. H. Johnson, Mark Byrd, M. W. Luckey, Nath'l White, and Edw'd Smith, plaintiffs in error, vs. John W. Lapsley. W. Texas C. C. U. S. Filed 30 November, 1872.

United States Supreme Court.

October Term, 1873.

N. A. McPHAUL ET AL.,
PLAINTIFFS IN ERROR,
vs.
JOHN W. LAPSLEY,
DEFENDANT IN ERROR.

No. 301.

In Error to the U. S. Circuit Court for the Western District of Texas.

BRIEF FOR PLAINTIFFS IN ERROR.

John W. Lapsley, 31st March, 1863, in the district court of McLennan county, Texas, sued N. A. McPhaul *et al.*, to try the title to and recover possession of eleven square leagues of land, and damages for illegal occupancy, &c., &c.

Rec., pp. 1, 2.

R. N. Goode defends on the grounds following: 1st. Insufficiency of plaintiff's petition; 2d. The general issue. 3d. Denial of trespasses or wrongs; 4th. That he is the owner in fee of 963 acres of land, and been in quiet and peaceable possession thereof with title or color of title for

more than three years before this suit, and he pleads the statute of limitation of three years.

He farther pleads the statute of five years and of ten years, and claims judgment for his improvements in the sum of $5,000.

He concludes with an averment that plaintiff's title is null and void, *because founded on a forged and fraudulent power of attorney of Tomas de la Vega.*

Rec., p. 4.

There was a consent-judgment on this issue in favor of Goode and against Lapsley, based upon the confession and statements of the parties in the presence of the court, and an agreement of March 30, 1864, (after this suit was brought.) This judgment is of date May 27, 1864.

Rec., pp. 5, 6, 7.

November 22, 1870, N. A. McPhaul for himself and children, and Ann E. Tipton for herself and minor children, appear and say to plaintiff's petition, 1st, that the matters and things in said petition are not sufficient in law to have and maintain this action; and, 2d, that Peter Fleming was in the year 1835 a grantee of a certain league of land, 4,428 acres; that he and his heirs have been in the *bona fide* and actual possession of the same, living upon and cultivating it, for more than thirty years; 3d, that, finding an outstanding title in Thomas de la Vega, they bought it from him; 4th, they disclaim all title, except to this league. They pray for trial by jury, and a confirmation of their title against all the world, and especially Lapsley and those claiming under him.

Rec., pp. 8, 9, 10.

Thomas de la Vega appears on the same day; avers he had a perfect title to eleven leagues of land originally granted him by the Government in 1833, and that he sold to defendants, (Sarah A. McPhaul and Ann E. Tipton,) in 1850, the league of land they claim as above, and gave them a warranty-deed therefor; and that it is embraced within the said eleven leagues. He makes himself a party, asks to defend his title and warranty, and prays for a decree confirming title in said defendants.

Rec., p. 10.

August 7, 1871, Lapsley's petition to transfer to the United States circuit court of the western district of Texas was filed. It is based upon the belief that, "from preju- "dice and from local influence, he will not be able to ob- "tain justice in said cause in the district court of McLen- "nan county, State of Texas, where the same is now "pending."

Rec., pp. 10, 11, 12, 13, 14.

The order was given, and the suit transferred August 10, 1871.

February 2, 1872, N. A. McPhaul alone moves to dismiss the suit for want of jurisdiction and other matters. The suit was dismissed as to all parties except N. A. McPhaul.

Rec., pp. 18, 19, 20.

February 3, 1872, Simon Mussina makes oath that "a "*testimonio*, or second original of a power of attorney, pur- "porting to have been executed by Tomas de la Vega, "signing as Thomas Vega, to Samuel May Williams, of "date May 5, 1832, is a forged instrument of writing, as "he does verily believe."

February 5, 1872, plaintiff moves, on sundry grounds, to strike out and disregard this affidavit of S. Mussina.

Rec., p. 21.

The plaintiff's motion was sustained by the court, "because said affidavit was filed too late in the progress of "the trial of the cause," and "because the design of filing "said affidavit was to throw the burden of proof of the "execution of said power of attorney upon the plaintiff, "and that for this purpose the affidavit had been filed too "late."

Bill of Exceptions, No. 2, Rec., pp. 27, 28, 29.

The trial of the case began before the jury February 2, 1872, and the verdict was rendered on the 7th, in favor of plaintiff, for the land and $500 damages and costs, and on on the 29th of same month N. A. McPhaul obtained this writ of error.

Rec., p. 46.

ASSIGNMENTS OF ERROR.

1st. The lower court erred in assuming jurisdiction and in not dismissing the suit.

2d. And in striking out affidavit of S. Mussina as to the forgery of de la Vega's *testimonio*.

3d. And in admitting the *testimonio* of Thomas de la Vega in evidence to the jury.

4th. And in refusing to admit the defendant's proofs of forgery of the said *testimonio*.

5th. And in permitting the case to proceed against the plaintiff in error alone.

6th. And in declining to charge the jury to find for the defendant, N. A. McPhaul, for want of proper parties.

7th. And in refusing the *sci. fa.* to make Robert Wright a party.

8th. And in refusing to charge the jury that the decree of the district court of Falls county, Texas, precludes the plaintiff Lapsley from recovering in this case the 800 acres of land described in said decree, and decreed to Sarah A. McPhaul, wife of the defendant, in her lifetime.

9th. And in refusing the *sci. fa.* to make the heirs of Ann Delk parties.

10th. And in charging that the documentary proof offered by plaintiff formed a chain of title connecting the plaintiff with the sovereignty of the soil, and established in him *prima facie* the legal title to the land in controversy at the date of the institution of this suit.

And that the admission in evidence to them of the *testimonio* of May 5, 1832, is *prima facie* evidence of its genuineness.

And farther, in substance and at the request of the plaintiff, that there was before them no evidence that *the testimonio* is not genuine, except the evidence of difference of name.

11th. That the court charged on the weight of the testimony, and erroneously took the decision of the case away from the jury.

12th. That after the jury had retired, and when they

afterwards returned for farther instructions, the judge repeated the errors of his original charge in an aggravated form.

ARGUMENT.

First. The defect of want of want of jurisdiction of the United States circuit court is apparent on the face of the papers. The plaintiff Lapsley, by his own volition, brought his suit originally before the district court of McLennan county, Texas, on 31st March, 1863; he was a citizen of Alabama. He obtains an order from the Texas court to transfer the case to the United States circuit court on his affidavit of prejudice and from local influence. One of the grounds of the motion to dismiss is that the transcript (from the Texas court) shows no grounds, under the law, for the jurisdiction of the court.

See act March 2, 1867, 14 S. L., 558.

It is submitted that the affidavit for the removal is insufficient. It was made, as it shows on its face, to avoid the effect of Lapsley's own original choice of a tribunal; to take the chances of litigation in a national tribunal in avoiding the law as expounded by the Texas court. Besides this, the law was made rather for the citizens of loyal States than for a citizen of Alabama; the prejudice and local influence mentioned in the act were meant to apply to juries and jury trials, and not to bills in equity or ejectment, where the whole case is always to be decided by the court. The act runs not against the judiciaries of the States, but against the inhabitants thereof, generally, so far as they, by the laws of the States, are made partakers in the administration of the law as jurors. But even if this view should not be sustained, the affidavit is defective in not stating the grounds of plaintiff's belief.

A vague and general conformity to the statute, by using its very words, should not suffice. The statute was made for an exceptional condition of things, which has now passed away, and should, therefore, be strictly construed and made applicable only to those cases contemplated by it. The act, if construed loosely, would destroy the natural jurisdiction of the courts of the several States, and unnaturally and discordantly enlarge the jurisdiction of the national courts. In view of Railroad *vs.* Whitton, (13 Wall., 286,) the jurisdiction of the national courts cannot, perhaps, be questioned on the ground of the unconstitutionality of the act of Congress; but, we submit, the interpretation of it should be strict and rigorous.

Another ground for dismissal, apparent on the record, page 18, is, that Lapsley did not bring into the circuit court copies of certain documents set forth in the affidavit of McPhaul's counsel, who swears that they were filed in this suit (as well as in others) in the State court, under notice to Lapsley's counsel, on December 26, 1870. It is true that the certificate of the clerk to "a full, true, and "correct transcript of the record, and copy of all process, "pleadings, depositions, testimony, and other proceedings "had in case No. 1093," &c., is on record, page 15, but, singularly enough, he omits "*documents.*" The judge gives no reasons for overruling the motion. (Record, p. 20.) The act of Congress seems to make the filing of copies of *all* the proceedings a condition precedent to the progress of the cause in the United States court; "the said copies "being entered * * in such court * * the suit shall "there proceed," &c.

It is true the act of March 2, 1867, (14 S. L., 558,) does not mention copies of "*documents;*" but we entirely mistake the intent of the act and the meaning of words if these "*documents*" be not included, when filed regularly

in court, in "*other proceedings had.*" Unfortunately, we cannot judge of the reasons swaying the judicial mind, and we are bound to construe them objectively, and to avoid construing them subjectively. Your honors need however, only to see a fair and frank compliance with the terms of the law, which is not here exhibited. The exception is, perhaps, technical, but it is urged in a good cause and for an excellent purpose. If our clients, against their will, are to have their cases tried by the national courts, it is their plain right and duty to see that the former do not step out of the sphere of their jurisdiction. This is no case for the application of the maxim, *est boni judicis ampliare jurisdictionem.*

Second. A *testimonio* is THE COPY of any document on file among the records of a notary public, the said officer certifying to its truth and correctness. The originals (*protocols*) always remain among his official records; and at his resignation or death pass into the custody of his successor in office, who in like manner issues certified copies thereof, under his official signature and seal. These certified copies are *testimonios.* (1st Febrero, p. 230, *et seq.*) They make, *prima facie*, full proof of all they contain when offered in evidence on a judicial contestation in Spain and her colonies. But they may be attacked and set aside if false, fraudulent, or forged; and the notary may at any time, in a proper case, be compelled to produce the original record before the court of his domicile.

In the present case, the *testimonio* is a COPY OF A POWER OF ATTORNEY; and the main questions in the case arise upon it. It is set forth in its original language on pp. 29, 30 of the record; and the translation is made part hereof. The attempt was made in the lower court to prove this *testimonio* false and fraudulent; and the *original power of attorney* a forgery. This attempt was unsuccessful in

every way in which it was raised, and forms the basis of the *second*, *third*, *fourth*, and *tenth bills of exception*.

An affidavit was made by de la Vega's attorney that the *testimonio* or second original of a power of attorney purporting to be executed by Tomas de la Vega, signing as Thomas Vega, to Samuel May Williams, of date May 5, 1832, is a forged instrument of writing.

Rec., pp. 21, 28.

The affidavit was stricken out.

Rec., p. 29.

When the *testimonio*, with all its endorsements, references, certificates, jurats, affidavit of the notary giving the copy, &c., &c., was offered in evidence, it was objected: 1st. No presumption arose from its age in favor of its validity; 2d. Violent presumption of its fraud and falsity, because not recorded for nearly thirty years from its date; 3d. Because there was no law warranting or prescribing its recordation; 4th. Because there was no sufficient evidence, even if it were a paper required or permitted to be recorded, to warrant its admissibility to record; 5th. Because there is no evidence offered at bar to prove the writing, as required by common law. All these objections were overruled, and defendant excepted.

Rec., 29 to 35.

Then defendant put a witness upon the stand to prove that the protocol or original power of attorney, in the records at Saltillo, of which the alleged certified copy of May 5, 1832, was a true copy, had not to it the signature, or the pretence of signature, of any one or person except Jose Maria de Aguirre and Juan Gonzales; that there was an

original protocol of a power of attorney, signed by Jose Maria de Aguirre, or Aguire, and Tomas de la Vega and Juan Gonzales, and with assisting witnesses, Ortes and Moral, dated April 28, 1832; and the witness had with him in court photographic copies of the said seven leaves of the said book (original book of protocols) to show exactly what he states. The judge refused to hear the witness, and defendant excepted.

Rec., pp. 35, 36.

Then the judge charged the jury that, having admitted the *testimonio* in evidence, it was *prima facie* evidence of its genuineness; that there was no evidence that the *testimonio* is not genuine except the evidence of difference of name; to which charges the defendant excepted on the grounds following, viz:

First. The charge took from the jury the question of the identity of the grantee of the eleven leagues of land and the maker of the *testimonio;*

Second. The admission of the *testimonio* in evidence to the jury is no evidence of its genuineness; and

Third. The charge is on the weight of testimony, and excluded the extrinsic evidence of its want of genuineness, which the paper showed from its want of record in the proper courts for twenty years from its date.

Record, pp. 40, 41, 42, 43, 44, 45, Bill of Exceptions.

The defendant was possessor as owner, in good faith, of the *locus in quo* for a long number of years. His possession was *prima facie* evidence of his *seisin in fee*, and

good against all the world save the rightful owner. Lapsley claimed to be that rightful owner; and until he legally proved his title and the requisite *strength* of it he could not recover. The chain of his title could not be stronger than its weakest link; and the weak link was, as we contend, the power of attorney from de la Vega to Williams, dated May 5, 1832.

We think the lower judge erred. On general principles it never can be too late, on any trial of title to real estate, for the defendant to prove that a deed, document, power of attorney, last will, *donatio intervivos*, or *mortis causa*, or any written muniment of title, is false, fraudulent, and a forgery. No notice can cure a defect of this character. No failure to object to the admissibility of the document in evidence can conclude the defendant from proving its absolute nullity.

Jordan *vs.* Robson, 27 Texas, 615.
Younge *vs.* Guilbeau, 3 Wallace, 640.

Nor can it be contended successfully that plaintiff had no notice in fact. Whilst the case was in the State court, one of the defendants herein, R. N. Goode, May 24, 1864, (Rec., p. 3,) pleaded that the plaintiff's title "was derived "from under a pretended power of attorney, * * * *was* "*a forgery and fraudulent;* that Thomas de la Vega did "not make, or cause to be made, to the party aforesaid any "such power of attorney, or authorize the party aforesaid "to sell, in any way whatever, the said lands or any part "thereof." This was filed nearly eight years before the trial.

Rec., 22.

And there was a judgment upon the issue raised by this

allegation, and Lapsley made confession and statements in open court, and Goode's title to a portion "of the De la "Vega eleven-league grant" was recognized and confirmed. Yet Goode continued a party to the suit; had notice served upon him of the deeds, documents, &c., filed and to be used as evidence by the plaintiff, (Rec., p. 17,) and the suit was only discontinued as to him on the very day the affidavit of S. Mussina of forgery was filed, to wit, February 3, 1872. (Rec., pp. 20, 21.) The record shows that no such notice or service was ever made on the defendant in his individual capacity; but only as next friend and natural guardian of the minors. (Rec., pp. 15, 16.) But the affidavit of Mussina was not made in behalf of McPhaul, but of Tomas de la Vega, an intervenor, without any notice whatever.

The court excludes Mussina's affidavit, for the reason, amongst others, that this affidavit was filed "to throw the "burden of proof of the execution of said power of attor-"ney upon the plaintiff," &c. But this is an admission that the burden of proof was upon defendant. Yet, when this was acknowledged, and defendant endeavored to make the proof required, the court refused to hear the evidence. In this there was error.

The position of the defendant in this case is that no power of attorney was ever executed by De la Vega to Samuel May Williams of May 5, 1832.

No *original* power of attorney in writing is produced or proved, because none existed or was ever signed. The defendant in error relies on a "certain paper writing pur-"porting to be the *testimonio* of a power of attorney from "Tomas Vega and others to Samuel May Williams to sell "the land claimed in plaintiff's petition, of date May 5, "1832."

Rec., p. 29.

First. The first objection to the admissibility of this paper writing, from a common law stand-point, is that the document is a copy and not an original, and the presumption of genuineness from age does not apply.

These principles of evidence are elementary, and if tested by those prevailing in an English court of law, it is very clear that this *testimonio* or *ex parte* copy, without any opportunity to cross-examine the witnesses as to its authenticity, would not be admitted in evidence.

Second. The *testimonio*, or copy, purports to be taken from the original *on the day of its date*, (5th May, 1832.)

It was recorded in McLennan county 7th September, 1856, (Rec., pp. 29, 33,) and in McLennan county on September 22, 1858, (Rec., p. 33,) and in Falls county October 6, 1859, (Rec., p. 33,) in county of Williamson, (Rec., p. 34;) that is, 24, 26, and 27 years after its date, respectively, were made the first attempts at its registration.

If a registration of the document were provided for by previous laws, as was the case, this omission to record furnishes a presumption against the genuineness of the document.

Third. A fatal objection, however, to the admissibility of the *testimonio* in evidence is, that no section of the laws of Texas in regard to registration of deeds and instruments of writing applies to this case. The document is clearly no *original* power of attorney, but an admitted copy, and professing on its face and under the certificate of the Alcalde himself to be *a copy*. The law of Texas providing for the registration of *powers of attorney* (Paschal's A. D., sec. 5005) says they "shall be proved or acknowledged accord-" ing to law." It is beyond all doubt that no such proof or acknowledgment could be made as to the *testimonio*, for it

was without any actual *signature* of De la Vega to it; if Thomas Vega was his name *that* name was *there;* but the paper purports on its face to be a copy written wholly by Juan Gonzales himself, as regidor, second alcalde, and acting in the absence of the notary public, and not by De la Vega.

FOURTH. But even if the document were such an one, the registration of which was contemplated by the statute, (Paschal's A. D., secs. 5001 *et seq.*,) then it neither was nor could be proved in the manner required by law. The affidavits are quite short of these requisitions, and the document is left as an office-copy of a power of attorney without the slightest effect as proof, farther than that there was, *in form*, such a power. Indeed, Gonzales says, more than twenty-five years after the alleged power of attorney was given, that he *executed* the *testimonio* (that is, the *copy*) of the power of attorney at the personal request of, &c., &c., and "that the signatures of * * and * * were signed as " assisting witnesses in his presence, and are their true and " genuine signatures," meaning and certifying that the witnesses are to *the fidelity of the copy*, and not to the correctness or genuineness of the original.

Neither of these assisting witnesses is produced. The case is precisely equivalent to an office-clerk in a common-law State copying a power of attorney, swearing to the execution of the original, having the copy recorded, and hoping by this means to make the copy supply the place of the original, under the special legislation of the several States. To affirm such a doctrine would be to extend the operation of the statute beyond all bounds.

But these assisting witnesses were not the witnesses to the signature of Vega or De la Vega to the original power of attorney. Three citizens and neighbors are declared

present at the execution and delivering. Their names are given in full: Antonio Espinoza, Rafael de Leon, and Francisco de la Fuente. Neither is produced, nor is his absence accounted for.

Were these witnesses bound under Spanish law to sign with the principals and notary? Most undoubtedly.

Did they sign? No. *De non apparentibus*, &c.

Was any one of them produced to prove the execution and acknowledgment? No.

See No. 5008, Paschal's A. D., act of May 12, 1846.

Hence the instrument was not within the terms of the act of May 13, 1846.

Paschal's A. D., No. 3716.

We do not conceal from ourselves that, by the jurisprudence of Spain, such a *testimonio* of a power of attorney would be, even though a copy, equivalent to the production of the original; but the right to prove it a forgery was always reserved to the parties to the act, their heirs and assigns; and this is the written law of France, Spain, and their colonies, even to this day.

But this law-institute of the "*Notariat*" forms no part of the laws of Texas; and now to introduce it would not only invalidate titles, but open the door to frauds of boundless number and interminable extent. The law is believed to be correctly expressed in the tenth bill of exceptions: "The admission of the *testimonio* in evidence to the jury is no evidence of its genuineness."

We think the court erred in admitting in evidence the *testimonio*, and that the bill of exceptions, No. 3, on page 29, was well taken.

If these views be correct; if, indeed, any one of these

three propositions be true, viz., that the court improperly struck out Mussina's affidavit, or erred in admitting the *testimonio* and its accompanying documents, or should not have excluded evidence of the forgery alleged by defendant, then the charge to the jury was properly excepted to, and all the judge said about plaintiff's claim of title was erroneous and misled the jury. So, too, was his entire charge as to the *testimonio*. Having excluded testimony going to prove that Tomas de la Vega never signed the original power of attorney, and assumed to himself the duty of determining the validity thereof, as well as of the *testimonio*, by refusing to hear evidence on this point, there was an apparent inconsistency in his telling the jury afterwards to find for the plaintiff generally, "*unless they* "*believe the testimonio, from the evidence, is a forgery.*"

The plaintiff in error also complains that the long delay of twenty-four years and over from the execution of the alleged power of attorney to the registration of the *testimonio* was a fact erroneously excluded by the judge from the jury. The presumption of fault and fraud arising from this gross neglect in registering the muniments of plaintiff's title was a proper element in the verdict. When the question is "whether one has so conducted himself as to mislead," it is always left to the jury.

L. R., 5 C. P., 50, Morris *vs.* Bethell.

The principle is well settled that documents defectively registered, or which appear on their face to be nullities, need not be noticed.

35 Penn'a R., 130, Goepp *vs.* Gartiser.

Statutes of registry are statutes of fraud.

45 Penn'a Rep., 174, Britton's Appeal.

These principles of law, as to the *testimonio*, were entirely disregarded on the return of the jury into court for subsequent instructions. The court says: "The *testimo-* " *nio*, the original and copy of which is before you of May " 5, 1832, is evidence for your consideration," whilst the record shows that only the *testimonio* or office-copy of the power of attorney was before the jury. He further says: " It is not necessary that the signature of the grantee, " Tomas de la Vega, in his own proper handwriting, should " be on the *testimonio* before you;" and also, " that if " Tomas de la Vega did sign the original of the *testimonio* " and the *testimonio* before you in the office at Saltillo, " then the *testimonio* given you in evidence, with proof of " a conveyance made by Williams, the attorney, by virtue " thereof, would divest La Vega of his lands, to wit, the " eleven leagues set out in plaintiff's petition."

This was objected to on several grounds, but mainly because it withdrew the minds of the jurors from the consideration of the want of genuineness of the *testimonio* arising from a *failure of plaintiffs to show the existence of or the genuineness of any protocol in Saltillo.*

Clark *vs.* Courtney, (5 Peters, 319,) goes much further than anything we contend for.

In Spencer *vs.* Lapsley, (20 Howard, 273,) this same *testimonio* was in contestation; but then the court relies for its judgment upon the fact that "its authenticity had never " been questioned by La Vega, so far as is shown in the " record."

And it is plain that in no suit instituted by Lapsley against any possessor of any part of the land embraced within the eleven leagues could the matter of this alleged forged, unsigned, and fraudulent power of attorney become *the thing adjudged* as to other third possessors or terretenants. For this would be confounding the *means of proof* with *the cause of action.*

The other assignments of error are submitted. So far as they touch on the want of proper parties, it is clear that the defendant individually could not be the proper defendant of his minor children in their claim to the land. (See Bill of Exceptions, No. 6, page 37 of Record.) These assignments of error generally involve principles of law either following as corollaries from those heretofore demonstrated, or are so plain and self-evident as not to need the aid either of principle or authority.

Quod nullum est, nullum producit effectum. The *testimonio* being a palpable fraud and forgery, susceptible of easy proof by the production of the original records of Gonzales, not by any means acting as a notary public under Spanish law, but as "*regidor of the corporation of the* "*city of Saltillo and second alcalde in turn*," the judge should have carefully pointed out to the jury the plain question they were to decide, but not how they were to decide it. The ambiguity and want of perspicuity of his original charge are repeated in an aggravated form when the perplexed jury returned for farther instructions. That the *testimonio* was a copy, and did not even *purport* to be signed by Tomas de la Vega, or any of the original grantors or principals, was, perhaps, not apprehended clearly by the judge; also the fact that the defendant wanted to prove that the *original* (protocol) power of attorney was not signed by Vega, or de la Vega. Both of these misapprehensions seem to pervade the trial, and to have led to the errors complained of.

We pray your honors to reverse the judgment.

DURANT & HORNOR,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *Feb.* 16, 1874.

(A.)

SEAL SECOND [SEAL] TWELVE RIALS.

FOR THE TERM OF 1832 AND 1833.

In the city of Leona Vicaria, on the 5th day of the month of May, 1832, before me, the citizen Juan Gonzales, regidor of the illustrious Ayuntamiento of this city, and second alcalde in turn in it and its jurisdiction, by reason of the sickness of the proprietary, who acts for a delegate judge, in the absence of the notary public, of whom there is none in the terms of the law, and the instrumental witnesses, who are mentioned at the end: appeared present, the citizens licentiate, Jose Maria Aguirre, Thomas Vega, and Rafael Aguirre, resident of this city, to whom I give credit, know and saw: That in the most extensive form which has place in right, they declare, agree and confer all their power, or as much as is required, and in right may be necessary, on Mr. Samuel May Williams, a resident of the town of Austin, especial, so that, in the name of the appearees, and on representation of their proper persons, rights, and actions, as soon as the law of colonization, of the 24th day of March, 1825, permits, he can and may proceed according to his will, to the sale of the leagues of land, which on the 14th day of June, 1830, the supreme government of the State conceded to the appearees, to which end, our said attorney can contract the sale or sales of the aforementioned leagues to the person or persons he thinks proper, whether for ready money or credit, at the time or times agreed upon, securing the amount of dollars for which he may sell said leagues, for the whole, to the extent necessary, or which may be necessary; they give and confer the present power, without any limitation, the appearees desiring as they do desire, that by reason of the failure to insert a clause, requisite, or condition, which is not here expressed, this power may not fail to work the end for which it is conferred, inasmuch as everything as far

as necessary is given for, asserted, and agreed to, as if it were actually written, with a free, full, and general administration and faculty of adjudication and attestation, and that he may substitute, revoke the substitution, and nominate others anew, who, as to everything that may assist in form, and that everything may stand which shall be done and practised by virtue of this power, the appearees bind themselves, with their persons and goods, present and future, and with them submit themselves to the seniors the judges and justices, who can and ought to take cognizance of their business and causes, so that they may compel and force them, by all the vigor of the law, and as if it were upon sentence passed, on the authority of a thing adjudged, consented to, and not appealed from, which for such they receive it; renouncing their proper domiciliary right and residence, and all law which can favor them, with that in general of form. Thus they agreed and signed, being witnesses the citizens Antonio Espinosa, Rafael de Leon, and Francisco de la Fuente and Gonzales, present and residents of this city. I certify,

JUAN GONZALES.

JOSE MARIA AGUIRRE. TOMAS VEGA. RAFAEL AGUIRRE.

Taken from its original, with which it agrees, on this, the day of its date. Given on two useful leaves of paper of the second seal, in conformity to law. All of which I, the undersigned judge, subscribe, acting with two of my assistants, according to law.

I certify,

JUAN GONZALES.

ASS.—JOSE NAZO ORTEZ. ASS.—J. ML. MORAL.

Supreme Court of United States.

N. A. McPHAUL
vs.
JOHN W. LAPSLEY. } No. 301.

Brief of P. PHILLIPS,

For Defendant in Error.

P. & R. O. POLKINHORN, PRINTERS, D ST. NEAR SEVENTH.

Supreme Court of United States.

N. A. McPHAUL
vs.
JOHN W. LAPSLEY. } No. 301.

Brief of P. PHILLIPS,

For Defendant in Error.

On the 31 March, 1873, Lapsley, styling himself a citizen of Alabama, filed his petition in the district court of McLennan county against McPhaul, Goode, *et al.*, to recover possession of the premises therein described and damages for their detention.

On the 24 May, 1864, Goode prayed, as his interest was entirely distinct from that of the other defendants, that he might sever, and the suit be maintained against him without prejudice to the other parties. p. 4.

On the 27 May there was a judgment in favor of Goode, according to an agreement made between him and Lapsley on the 30 March, 1864, for the purpose of quieting the title and making peace, for 763 acres. Goode on his part giving to Lapsley a quit claim to "the back land of said league, as well as to all the balance of said Dillard league, and the court adjudges and decrees the same unto said Lapsley, his heirs and assigns." p. 5.

McPhaul, for himself and in behalf of his children, filed an answer, claiming one league of land under a

grant to Peter Flemming, made in 1835 by the government of Coahuila and Texas, which they had perfected by a title from Thomas de la Vega.

Appended thereto is the statement of de la Vega that he had sold this league, in the year 1860, to Sarah A. McPhaul, and that this was within the 11 leagues claimed by Lapsley, and he asks to be made a party to defend his title warranty, and prays for a decree confirming the title to said defendants. p. 10.

This application was never allowed by the court.

On 7 August, 1871, Lapsley filed his petition to remove the cause into the Circuit Court of the United States, for the reasons set forth in an affidavit made before a justice of the Supreme Court of Alabama, on 24 July, 1871.

In this affidavit, after averring that he was a citizen of Alabama, he states that he "does believe that from prejudice and local influence he will not be able to obtain justice in said cause in the District Court of McLennan county, where the same is now pending." p. 11.

On the same day Lapsley executed his bond in the penalty of $1,000, that he will enter in the next Circuit Court United States for the western district of Texas a copy of all the proceedings in the cause, and do all other things required by law upon the removal of the cause. p. 13.

On the 10 August, the court entered the order approving the bond, and for the reasons stated, "adjudged and decreed" the removal as prayed for, Lapsley to pay all the costs incurred by this court. p. 14.

We have thus narrated everything which occurred in

the McLennan court, and these proceedings are verified by the certificate of the clerk, "that the foregoing 41 pages contain a full and correct transcript of the record." p. 15.

Under this order of transfer, the transcript thus certified, was filed in the Circuit Court United States for the western district, at the January term, 1872, held by Judge Woods.

"Comes the plaintiff in the following recited case, and filed in the clerk's office a transcript of the record from the District Court of McLennan county, of the proceedings therein, removed by order of said District Court for trial in this court." p. 1.

The first step taken in the cause in the Circuit Court was the filing of a notice by Lapsley on the 16 January, 1872, endorsed Lapsley v. N. A. McPhaul et al., with the marshal's return. "Received 18 January, 1872, and executed same day by handing to the within named defendant or person to whom this notice is directed, a true copy of said notice."

Then follows the entry, "notice to N. A. McPhaul, as next friend and natural guardian of minors, John, Henry, and Alice, and is in words, to wit:"

Following this is the notice "of the filing of the following documents, papers, transfers, bonds, and other instruments in the above entitled case, to be used as evidence on the part of plaintiff on the trial thereof."

The first of the documents mentioned is—"A *testimonio* of a power of attorney from Thomas Vega, José Maria Aguirre, and Rafael Aguirre, to Samuel May Williams, dated 5 May, 1832, the said *testimonio* being executed by Juan Gonzales, with his proper attesting witnesses, and duly recorded in the counties of Falls and McLennan, after being duly proved."

Again, it is objected "*that the law was made rather for citizens of loyal States than for a citizen of Alabama.*"

As I find nothing in the statute which excludes the citizen of Alabama from its provisions, it is deemed unnecessary to offer further comment on this head.

The *second* exception relates to the striking out of Mussina's affidavit.

The court granted the motion, sustaining it in all things, because it was filed too late, *in the progress of the trial*, and because the design was to throw the burthen of proof of execution of the power of attorney upon the plaintiff. p. 29.

The law of Texas provides, as follows: "Every instrument in writing, (properly recorded,) shall be admitted as evidence without the *necessity of proving its execution, provided* that the party who wishes to give it in evidence shall file the same among the papers of the suit three days before the trial, and give notice to the opposite party, of such filing, and *unless such opposite party, or some other person for him, shall within one day after such notice*, file an affidavit stating that he believes such instrument to be forged." Sec. 90, act 13, May, '46, p. 387, referred to, in

Hanric v. Barton, 16 Wall, 166.

It will be remembered, that notice of the filing was made on the 16 January, and the paper was not filed until the 3 February, and not sworn to until the 5 February, while the case was being tried.

If then this *testimonio* was "properly recorded," no argument could be made, and none has been offered to show error in the judgment striking it from the case.

Whether it was properly recorded, will be subsequent-considered.

The *third* exception relates to the admission in evidence of the *testimonio*, which is found at p. 30, in Spanish.

The following is a translation used by Congress, in the proceedings for the impeachment of Judge Waters, and is to be found in the Report against the impeachment, No. 540, 1st Sess. 25th Cong., vol 6, 487.

TRANSLATION OF POWER OF ATTORNEY.

Second seal two reals for the two years 1832 *and* 1833.

In th city of Leona Vicaria, on the fifth day of the month of May, in the year one thousand eight hundred and thirty two, before me citizen Juan Gonzales, *regidor*, (alderman) of the honorable council of this city, and acting *alcadi*, (mayor) therein, and in its jurisdiction, during the indisposition of the proper officer who officiates in the treasurer's office, no secretary being allowed him according to the terms of the law, and in the presence of the witnesses who will be named at the close hereof, personally appeared citizens Dr. (licenceado,) José Maria Aguirre, Tomas Vega, and Rapheal Aguirre, residents of this city well known to me, and declared that, in the most complete form which may be required by law, they grant, give over, and concede unto Mr. Samuel May Williams, a resident of the city of Austin, full power, as much as may be required and as may be necessary in law, specially, in order that in the names of these appearers, and in representation of their own persons, rights, and actions, so far as is allowed by the colonization law of the 24th March, 1825, he may be able to pro-

ceed, and may proceed, according to his judgment, to the sales of the tracts (sitios,) of land which, on the 14th June, 1830, the Supreme Governor of this State granted to them, the appearers; to which end their said attorney may covenant the sales of the aforementioned tracts to such person or persons as may apply therefor, either for cash or on credit, on such term or terms (of payment,) as may be agreed upon, receiving the amount of money, (dollars) for which he may sell the aforementioned tracts, that, for all that is required and may be necessary, they give and grant to him the present power, without any restriction whatsover, the appearers desiring as they do desire, that, by the absence of any expression, clause, requisite, or condition which may not be expressed herein, this power shall not be prevented from effecting all the objects for which it is granted, therefore, for all that may be required they grant it as matter herein and asserted to, as effectually as though they granted it with free, unlimited, and general administration and power to institute suit and make oaths, and that he may appoint substitutes, revoke substitutes, and name others *anew*, and in due form discharge them all; and to confirm all that may be granted and executed by virtue of this power, the appearers bind themselves, with their persons and their property, present and to come, and with them submit themselves to the law and jurisdiction of such judges and justices as can and should take cognizance of their cases and affairs, in order that they may compel and force them with all the vigor of the law, and as though they were by a decree vested with authority over the same as a master adjudged, closed, and not appealed; that to render it such, they have renounced their own forum, domicil and vicinage, and all the laws which might favor them in the usual form.

Thus have they granted and signed it in presence of these witnesses: citizens Antonio Espinosa, Rafael de Leon, and Francisco de la Fuente, Gonzales, residents of this city.

I attest:

JUAN GONZALES,
TOMAS VEGA,
JOSÈ MA. AGUIRRE,
RAFAEL AGUIRRE.

Copy from the original, with which it agrees the day of its execution; given on two "useful" pages of paper, of the second stamp, conformable to law. All of which I, the undersigned judge, officiating with those assisting me according to law, hereby attest,

JUAN GONZALES.

Witnesses:
JOSE NAZO ORTIZ,
J. MC. MORAL.

Annexed to the *testimonio* are certain affidavits on which it was recorded in McLennan county, as shown by the certificate of the proper officer, on 7 September, 1856.

Again in same county, on 22 September, 1858.

Again in Falls county, 6 October, 1859.

Again in Williamson county, 15 October, 1859.

Among the affidavits is one by Juan N. Seguin, made on 3 September, 1856, proving the handwriting of Juan Gonzales, and his *assisting* witnesses, Moral and Ortis, and that these parties, if living, are residents of Saltillo, in the State of Coahuila.

We have also one from Gonzales himself, made on the 13 July, 1857, testifying that the *testimonio* was executed by him, at the personal request of José Maria Aguerre,

Rafael Aguerre, and Thomas Vega, and in their presence. That the signature "Juan Gonzales" is his genuine signature, officially signed as Regidor of the corporation of Saltillo, and second Alcalde in turn, in the year 1832, as expressed therein; and that the signatures of Nazo and Moral, who signed as assisting witnesses, in his presence, are their genuine signatures. That Thomas de la Vega executed a certain other power of attorney before him to said S. M. Williams, on 28 April, 1832, and the said Thomas Vega, who is a party to this testimonio, is one and the same person. That he knows of no other Thomas Vega, or Thomas de la Vega, in the city of Saltello, or any other part of Mexico." pp. 30–34.

The introduction of this evidence was resisted on the ground that the *testimonio* was but a *copy*.

And if an *original* it was not sufficiently proved to entitle it to registration.

As to the first, we say, that the paper is an *original*, executed by the Regidor, a public officer, exercising *quasi* judicial power. The parties to an agreement appear before him, accompanied by a certain number of their neighbors, as *instrumental witnesses*. They state the matters between them. The officer makes a minute of the terms stated; he then enters in a book the formal agreement. This is the *protocol*, and he then furnishes to the party in interest a similar document to the protocol. This is generally called a *second original*.

Such is the description given to it in Mussina's affidavit.

An instrument in writing (*escritura*) is every deed that is made by a public escribano, or notary of a corporation or council, (concejo.)

Among public instruments are reckoned those which are made by escribanos of Cabildo, for things relating to them.

A copy made by an escribano from a protocol which *another* made, may not be proof, unless the original be also shown. *But it is otherwise where the copy is made by the same notary who made the protocol.*

In Owings v. Hull, the court, referring to the civil law, say:

"Where a contract or other act is executed in a particular manner, before a notary, the *protocol*, or original, remains in his possession *apud acta;* and the act is deemed what is called technically an *authentic act*, and a true copy by the notary, is proof of what is contained in the original." 9 Pet., 625.

In Mitchell v. U. S., same volume, 732, it was objected that the original acts of confirmation by Governor Folch, were not produced, and that the copies offered in evidence were not legal proof of such acts.

But the court say: "The deeds of confirmation were made according to the rules of the civil law adopted by Spain. The original is a record, and is preserved in the office, and cannot be taken out. A *testimonio*, or copy, is delivered to the party, which is deemed to be and is certified as *an original paper, having all the effect of one, in all countries governed by the civil law.*"

These cases are referred to by the Supreme Court of Texas in 1844, the question arising on an act of sale made in the town of Mina, before a judge of the first instance, and the same doctrine is held.

Smith v. Townsend, Dallam's Di., p. 570.

In Herndon v. Casiano, the same principle is repeated. "The *testimonio* though denominated a second original is still an original." 7. Texas, 332.

That Gonzalez in his character of *Regidor*, was a proper officer to discharge the function he exercised, was decided when this *testimonio* was before the court, near twenty years ago.

Spencer v. Lapsley, 20 How, 273.

In Martin v. Parker, decided in 1861, it was objected that the act of sale made in 1830, was not authentic and therefore inadmissible as evidence, without proof of execution. The court say "we do not think the objection well taken. The signature of a judge or alcalde acting in place of a notary authenticated by two attesting witnesses, has all the force and effect of the signature and seal or rubric of a notary." 26, Texas, 260.

REGISTRATION.

By the act 20 December, 1836, all persons who claim lands, by deed, lien, or any other color title, are required to record them in the Clerk's Office of the county where the land lies *within twelve months from the* 1 *April.*

The 35 section makes it the duty of the clerk to record all deeds, conveyances, mortages, and other liens and all other instruments in writing, provided that one of the witnesses shall swear to the signature of the *signer*, or he *himself shall acknowledge the same.*

The 40 section proceeds that no deed, conveyance, lien, or *other instruments* respecting lands shall take effect as to third persons until proved and recorded.

The act of 10 May, 1838, *repealed the twelve months limitation* of the act of 1836.

These acts are cited by the Supreme Court of Texas, with the statement that subsequent legislation has not materially changed them.

Guilbeau vs. May, 15 Texas 414.

By the act of 19 January, 1839, vol. 1 p. 47. It is made the duty of county clerks to record all "deeds, conveyances, mortgages, and other liens affecting the title to land." Provided one of the subscribing witnesses shall swear to the signature of the *signer*, or *he himself* shall acknowledge the same before the clerk, &c., and all laws in conflict are repealed."

Sec. 2 provides, that copies of all deeds, &c., when the originals remain in the public archives, and were executed in conformity with the laws existing at these dates, duly certified by the proper officer, shall be admitted to record where the land lies."

In the case last cited, after quoting this act, the court say.

"It is believed this act has a direct reference to *this description of titles.* It is well known that the titles to land executed prior to our separation from Mexico, the orignal remained as an archive, and a *testimonio* was given to the interested party as evidence of his title.

But for this enactment it might be contended, that a *testimonio*, being only an *authentic copy*, was not required to be recorded in the county where the land lies.

This act leaves no doubt on the subject that this kind of evidence of title ought to be recorded." (This decision was made in 1855.)

By the act 12 May, 1846, p. 236, clerks of the County Court are made recording officers for their several counties.

The 4th section makes it their duty to record "All deeds, mortgages, conveyances, deeds of trust, bonds,

covenants, defeasances, or *other instruments of writing of and concerning any lands.*

The 5th section makes similar provision for marriage contracts, *powers of attorney* and official bonds.

By the 7th section the acknowledgement is to be made "by the *grantor or person who executed* the instrument in writing."

The 8th section provides for proof being made by the subscribing witnesses.

By the 9th section when the witnesses are dead, or their residence unknown, or when they reside out of the State, the instrument may be proved by evidence of the hand writing of the "grantor OR person who *executed the same*, and of one of the subscribing witnesses—and this proof is to be made by "two or more disinterested witness."

This act was to take effect July, 1846, and all prior laws in conflict with it, are repealed.

The 4th section which we have cited as descriptive of the instruments to be recorded, is embodied in article 2787, of Hartley's digest. And in commenting on this, and several of the preceding articles in that digest—the Supreme Court of the State say: "It is the obvious policy to require *all instruments concerning land*, to be recorded in the proper county. They therefore hold that an *assignment of a mortgage* is within the provision of the act."

This decision was made in the year 1858.

Parson v. Pilgrim, 22 Tex., 476.

So in the same year it was held that a *covenant for title*, though a mere executory contract, was within the law.

Secrest v. Jones, 21 Tex., 133.

It would seem to be evident that the testimonio in this

case is an *instrument in writing concerning land*, as described in the 4 sec.

And that the acknowledgement by Gonzales was made by *the person who executed the instrument.*

And that his deposition, together with that of Seguin, as to the genuineness of the handwriting of the assisting witnesses, (who are residents of a foreign country,) bring the case fully within the provisions of the 7 and 9 sections.

In the case of Edwards v. James, the officer who executed the testimonio acknowledged the same, and on this it was recorded. It was held this was sufficient under the 35 sec. of the act of 1836, being the act first herein cited. The language of the court is:

"The officer who executed the protocol, and issued the copy or second original, appeared before the county register and acknowledged his signature to the certificate authenticating the *testimonio*, and this was sufficient, under 35 section of the act of 1836, to have authorized its record."

This point was considered in the case of Paschal v. Perez, 7 Tex., 348.

Edwards v. James, 7 Tex., 377.

If we compare these words of the act of 1836 with those of 1846, we find them to be substantially the same.

In the first, evidence is to be produced as to the "signature of the *signer*, unless *he, himself*, shall acknowledge the same."

By the second, the acknowledgment is to be made by the "grantor, or *person who executed the instrument.*"

The signer of the instrument, and the person who executes it, are the same. So that the decision made under

the act of 1836 applies in full force to a like acknowledgement made under that of 1846.

In Paschal v. Perez, (*supra*,) the court say: "If the instrument be legal and authentic, *without subscribing witnesses*, it would require language too plain to be mistaken to exclude it from record for the want of proof by such witnesses, the signature of the *signer* being substantiated by satisfactory proof." p. 358.

As already stated in this case, we not only have this acknowledgment of the *signer*, but the evidence of two witnesses to his signature, and the genuineness of the signature of the assisting witnesses, non residents.

The *fourth* exception, page 35, relates to the exclusion of the evidence of Walker, who was offered to testify, that in 1868 he went to Saltillo and examined the book of protocols, and there found a power of attorney dated 5 May, 1832, from Josè Maria Aguirre to Williams, to sell the land which had been granted to Thomas de la Vega, Rafael de Aguirre, and Josè Maria de Aguirre, 11 leagues each, but this was not signed by de la Vega, nor any witnesses.

That he found in said book a power dated 28 April, 1832, signed by Josè Maria de Aguirre, and Thomas de la Vega, and Juan Gonzalez, with assisting witnesses Ortez and Moral, *and that he has in his hands*, photograpic copies of the said seven leaves of said book, to show what he states.

Here we have an attempt made to discredit a title to thirty-three leagues of land, forty years after its execution, by showing a discrepancy between the *testimonio* and the matrix or protocol.

If evidence to this effect is admissible at all, it must

come from the best source. The officer in charge of the archives should have been examined, and the documents themselves, or authentic copies should have been produced in court for inspection.

This was decided by Judge Duval in dismissing the bill filed by de la Vega. He says, "what purports to be a photographic copy of the protocol ought not to be entertained as proof at all, because not established by deposition, or under special order of the court." p. 831.

It is by no means admitted that if proper evidence of discrepancy had been produced, this would have invalidated the *testimonio.*

On this subject we find it stated by Sala, that the paper which was *always* signed by the parties and witnesses is the *first draft on common paper.*

That it *ought* afterwards to be extended in the book of protocols, and *should* be again signed by them.

That the first paper when, free from blots, &c., is better evidence than the protocol, because it is *always* signed by the parties, whereas the protocol is *not always signed by them*, and because the former contains the rubric or seal of the officer, while the latter does not.

That the protocol has full faith for which it is intended; *but in court so much faith is not awarded to it, as to the testimonio, because it was not established for the purpose, and because it wants the rubric, or seal which authenticates it, and which every public instrument ought to have.*

That the *testimonio* makes full proof except in cases where the instrumental witnesses dispute it.

(4 Sala, 127, 130, 236.)

By a law of Texas all the *archives* were required to be deposited in the General Land Office, whether in possession of an *Empresario*, Political Chief, Alcalde, Commis-

sary or Commissioner. The failure to do this was visited with a heavy penalty. Documents so deposited were to remain there, and certified copies were made evidence.

In Titus v. Kimbro, a *testimonio* was offered in evidence and held to be conclusive, and to be better evidence than a certified copy of an *original title* from the General Land Office. 8 Texas, 212.

Further. This evidence was properly rejected, because it was an attempt to invalidate the instrument in opposition to the provision of the 90th section of the act of 1846, *supra*, which dispensed with the proof of execution of a recorded instrument, when no affidavit was made that it was a forgery.

The *fifth* exception, as taken in the court below, appears at p. 37.

And we say, first, that there is no assignment of error in this court, in conformity to the rule, as the judge's charge is not given.

But further, the judge was requested to charge, that unless the jury believed that the grantee and Thomas Vega were one and the same person, the instrument must be disregarded.

The instruction was given with this qualification—that if the jury believe that the grantee was known indifferently as Thomas Vega, and Thomas de la Vega, then the presumption is that he is the same person, and you will so consider unless satisfied such is not the fact.

There can be no valid objection to this charge.

The several documents show, that when Williams, as attorney, applied in 1833, for a title of personal possession, he describes himself as "attorney of José Maria Aguirre, Rafael Aguirre, and *Thomas Vega*, inhabitants of the town of Leona Vicaria." p. 40.

When Lesassier grants the title he describes the 11 leagues as "denounced by the attorney of *Thomas de la Vega.*" p. 41.

When the surveyor makes his return, he says he has executed it "by virtue of your decree for the attorney of "*Thomas de la Vega.*" p. 41.

In the petition of José Maria Aguirre—he declares it is made on his own behalf, and also in the name of *Thomas Vega* and Rafael Aguirre." p. 42.

When in conformity to this petition Lesassier makes his decree, he describes it as made in favor of "José Maria Aguirre, Rafael d'Aguirre, and *Thomas de la Vega.*" p. 43.

The *seventh* and *eighth* exceptions, at p. 38, 39, relating to a request for a *scire facias*, to Wright, and the heirs of Delk need not be commented on. It was properly refused, because all parties had been long before dismissed, except McPhaul. X

The *tenth* exception, at p. 45, shows that the plaintiff having introduced his chain of title, and the *testimonio* and other deeds, the validity of which was not questioned, the court charged.

That the admission in evidence of the *testimonio* is *prima facie* evidence of its genuineness.

X whether the decree offered in evidence was properly rejected because not legally authenticated, &c. cannot be determined as the decree is not set out in the record

That there was no evidence, that it was not genuine, except that relating to difference of name.

The charge is as favorable to the plaintiff in error as the law in any aspect would permit, in holding the *testimonio* only as *prima facie* evidence.

In United States v. Wiggins, a certified copy made by the Secretary of State, was admitted.

The court advert to Perchmann's case, in which they had held that a copy of a Spanish grant, certified by the Secretary, could be given in evidence on general principles, without accounting for the non-production of the original.

And to United States v. Delespine, where it was said "the first copy was made from the original which could not be removed for any purpose. That copy it is admitted would have been evidence in the cause.

The court then say—we have established that the copy of the petition and decree are *prima facie* evidence when certified by the Secretary of State. What is *prima facie* evidence of a fact? It is such as, in judgment of law is sufficient to establish the fact, and if not rebutted, remains sufficient for the purpose.

14 Pet., 347.

In the case of Paschal v. Perez, *supra*, the court say, that the admissibility of this evidence without any proof of the execution of the instrument considered as the act of a foreign officer, is by no means a settled question at common law, and on the principles of international jurisprudence.

Whether the rules of the forum, or those of a foreign country, are to have weight, is much discussed by Story, in his work on the conflict of laws. 634.

In the late case of Ward v. McKinney, the same court

say: "The question is whether *coming from the possession* of *the interested party, the instrument* proves *itself by its mere production in the court?*"

"There is no doubt it would, have been received in evidence before the change of Government; and if it were a new question in this court, it might be contended with much force that our courts should officially take notice of the authentic acts of the former Government."

The court however refers to Paschal v. Perez, and Edward v. James, as requiring that some proof of execution should be made.

These cases however do not reach the question made by this exception.

We need not claim that the *testimonio* coming from our possession would have proved itself—we rest its admission in evidence without proof of execution, on the ground that the statute of the State *made it evidence after it had* been *recorded, and when notice had been* given *that it was to be used in evidence on the trial.*

In Harvey v. Hill, the court of Texas, referring to such a title say, "It purports to have been executed before a notary, and if *recorded according to law, must be admitted in evidence* without *proof of execution*"

7. Texas, 597, and 26 Texas, *supra.*

In a recent case involving this very title, Judge Woods held in the Circuit Court—that as the paper was more than forty years old, and had been on record many years, it would be a great hardship to require land owners to keep constantly on hand living witnesses to prove up the execution after so many years had elapsed, and that it should now prove itself.

The *eleventh* exception, p. 45, is to the answer given to the interrogation of the jury, who came into court after they had been charged.

What the interrogation was is not stated in the Record. The clerk, in a note, says it was on a piece of paper, which was not preserved.

The judge in effect told them that it was not necessary that the signature of de la Vega, in his own proper handwriting, should be on the *testimonio* in evidence, and if he signed the original at Saltillo, then this, together with a conveyance from Williams, divested la Vega of his title to the premises.

The complaint is that the jury had already received full instructions, and that the judge's response to the inquiry of the jury diverted the attention of the jury from the consideration of the genuineness of the *testimonio*, arising from the omission to record it so long after its execution, and to show the existence of the protocol.

It was surely a matter within the discretion of the judge to respond to the jury, and if there was no error in his response, it is a vain thing to speculate as to its influence on the other charges given.

It may be further remarked, that no instruction was asked for as to the effect of the lapse of time before the instrument was recorded. If such instruction had been asked, it would have been properly refused, as the registration, whenever made, is effective from its date.

On these considerations we submit that the judgment must be affirmed.

THE WRIT OF ERROR.

The writ in this case is sued out by McPhaul and

wife, Tipton and wife, Goode, Parsons, Johnson, Byrd, Luckey, White and Smith, to correct a judgment rendered against them.

There is no judgment such as is described in the writ.

The only judgment is against McPhaul alone. He alone petitioned for the writ.

The writ must, therefore, be dismissed, if amendable in this particular, as to all others than McPhaul.

P. PHILLIPS,
For Defendant in Error.